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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 172

ERIC G. KAUFMAN AND AENNI C. KAUFMAN,
PETITIONERS,

vs.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1951.
CERTIORARI GRANTED OCTOBER 15, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. ET AL.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A. (also known as INTERNATIONALE INDUSTRIE- & HANDELSBETEILIGUNGEN A. G.); and formerly named INTERNATIONALE GESELLSCHAFT FUR CHEMISCHE UNTERNEHMUNGEN A. G. (I. G. CHEMIE) and SOCIETE INTERNATIONALE POUR ENTREPRISES CHIMIQUES S. A. (I. G. CHEMIE),
A corporation,
Address: Basle, Switzerland,
Plaintiff,

v.

TOM C. CLARK,
Attorney General of the United States,
as Successor to the Alien Property Custodian,
Address: Department of Justice, and
WILLIAM A. JULIAN,
Treasurer of the United States,
Address: Treasury Department,
Defendants.

Civil Action No. 4360-'48

Filed Oct. 21, 1948

Complaint for Return of Seized Property

FIRST COUNT

1. This action arises under the Fifth Amendment to the Constitution of the United States and the Trading with the Enemy Act of October 6, 1917, as amended, (U. S. C. Title

50, Appendix, Sections 1 to 38, inclusive). Both defendants are particularly sued under Section 9(a) of said Act and are required to retain the property or money sought herein pending the outcome of this action.

2. Plaintiff is a corporation organized under the laws of the Confederation of Switzerland, has its principal office at Basle, Switzerland, and is and always has been a citizen of Switzerland. Its name has been changed from Internationale Gesellschaft für Chemische Unternehmungen A. G., (I. G. Chemie) and Societe Internationale pour Entreprises Chimiques S. A. (I. G. Chemie) to Societe Internationale pour Participations Industrielles et Commerciales S. A. and Internationale Industrie- & Handelsbeteiligungen A. G.; and it is now commonly sometimes called "INTERHANDEL".

3. Plaintiff is not, nor at any of the times herein specified or material hereto has been, an enemy or ally of enemy of the United States within the meaning of such terms under the said Trading with the Enemy Act, nor a national of a designated enemy country within the meaning of any law, executive or vesting order or governmental regulation.

4. On and prior to February 16, 1942, and continuously thereafter, plaintiff was and is the owner of 2,050,000 shares of the Common B stock, and 455,448 shares of the Common A stock, of *General Aniline & Film Corporation*, of a value in excess of One Hundred Million Dollars ($100,000,000).

5. On February 16, 1942, the Hon. Henry Morgenthau, Jr., as Secretary of the Treasury, issued a certain Vesting Order whereby he illegally seized the aforesaid shares of stock and vested the same in himself as such Secretary; that thereafter, on, to-wit, April 24, 1942, the Hon. Leo T. Crowley, then Alien Property Custodian and one of the predecessors of the defendant Clark in this action, issued his Vesting Order No. 5, whereby he illegally vested the same shares in himself as such Alien Property Custodian; that on the same date, to-wit, April 24, 1942, the said Secretary of the Treasury, at the request of the then Alien Prop-

erty Custodian, delivered, transferred and assigned said shares to the said then Alien Property Custodian.

6. That effective on, to-wit, October 15, 1946, by
54 Executive Order No. 9788, the Office of Alien Property Custodian was terminated, and all authority, rights, privileges, powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be administered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds thereof, were transferred to the Attorney General; and that, pursuant to said Executive Order, said shares are now in the possession of one of the defendants in this action, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, but they are held illegally by him.

7. That said shares of stock were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

8. On or about February 1, 1943, and also on or about June 2, 1948, plaintiff duly filed with the defendant Clark Notices of Claim under oath, with respect to the aforesaid shares of stock, in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

9. Defendant Clark is retaining the aforesaid shares of stock, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and they should be returned to the plaintiff as the sole owner thereof.

10. The defendant, William A. Julian, Treasurer of the United States, is sued as a defendant in this Count by virtue of the provisions of Section 9(a) of the said Trading with the Enemy Act, because cash dividends which have been received by the defendant Clark and his predecessor Cus-

todians upon the shares of stock described herein are on deposit with and in the possession of the defendant Julian in an account in the United States Treasury in the name of the defendant Clark, and are wrongfully and illegally held by the said defendant Julian.

WHEREFORE, plaintiff demands:

(1) Judgment, that it is entitled to the return and immediate possession of the shares of stock described in the 4th paragraph hereof.

(2) Judgment that the defendants, respectively, account for and deliver and transfer said shares of stock to the plaintiff, together with all dividends (including stock of the plaintiff corporation) and avails thereof and all right, title and interest therein.

(3) Judgment for the costs of this action.

SECOND COUNT

1-3. Plaintiff incorporates into and makes a part of this count the averments contained in the first, second and third paragraphs of the first count of this Complaint.

4. On and prior to February 15, 1943, and continuously thereafter, plaintiff was and is the owner of 176 shares of the Common A stock of *General Aniline & Film Corporation*, of a value in excess of Thirty-five Thousand Dollars ($35,000.00).

5. On February 15, 1943, Hon. James E. Markham, as Alien Property Custodian, and the predecessor of the defendant Clark in this action, issued his Vesting Order No. 907, whereby he illegally seized the aforesaid shares of stock and vested the same in himself as such Custodian.

6. That effective on, to-wit, October 15, 1946, by Executive Order No. 9788, the Office of Alien Property Custodian was terminated, and all authority, rights, privileges, powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be

administered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds thereof, were transferred to the Attorney General; and that, pursuant to said Executive Order, said shares are now in the possession of one of the defendants in this action, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, but they are held illegally by him.

7. That said shares of stock were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

8. On or about June 2, 1948, plaintiff duly filed with the defendant Clark a Notice of Claim under oath, with respect to the aforesaid shares of stock, in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

9. Defendant Clark is retaining the aforesaid shares of stock, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and they should be returned to the plaintiff as the sole owner thereof.

10. The defendant, William A. Julian, Treasurer of the United States, is sued as a defendant in this count by virtue of the provisions of Section 9(a) of the said Trading with the Enemy Act, because cash dividends which have been received by the defendant Clark and his predecessor Custodians upon the shares of stock described herein are on deposit with and in the possession of the defendant Julian in an account in the United States Treasury in the name of the defendant Clark, and are wrongfully and illegally held by the said defendant Julian.

WHEREFORE, plaintiff demands:

(1) Judgment that it is entitled to the return and immediate possession of the shares of stock described in the 4th paragraph hereof.

57 (2) Judgment that the defendants, respectively, account for and deliver and transfer said shares of stock to the plaintiff, together with all dividends (including stock of the plaintiff corporation) and avails thereof and all right, title and interest therein.

(3) Judgment for the costs of this action.

THIRD COUNT

1-3. Plaintiff incorporates into and makes a part of this count the averments contained in the first, second and third paragraphs of the first count of this Complaint.

4. On June 24, 1946, Hon. James E. Markham, as Alien Property Custodian, and the predecessor of the defendant Clark in this action, issued his Vesting Order No. 6718, whereby he illegally seized the sum of Nine Hundred Seventy-five Thousand, Two Hundred Forty-four Dollars and Seventy Cents ($975,244.70), comprising the aggregate of balances to the credit of four certain accounts in the name of and belonging to the plaintiff in the banks and for the amounts hereinafter more fully described, and the said Markham vested the same in himself as such Custodian. The names of said banks and the dollar balances to the credit of plaintiff's accounts therein are respectively stated as follows:

Bank of the Manhattan Co	$182,092.90
Irving Trust Co	186,302.08
Credit Suisse, New York Agency	288,669.07
Swiss Bank Corp., New York Agency	318,180.65
Total	$975,244.70

5. At all times on and prior to June 24, 1946, and continuously thereafter, plaintiff was and is the owner of the aforementioned moneys, funds and credits in said accounts and the only one entitled to the proceeds thereof.

6. That effective on, to-wit, October 15, 1946, by Executive Order No. 9788, the Office of Alien Property Custodian was terminated, and all authority, rights, privileges,

powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be adminstered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds thereof, were transferred to the Attorney General; and that, pursuant to said Executive Order, said sum of money is now held by one of the defendants in this action, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, and is deposited with and in the possession of the other defendant, William A. Julian, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant Clark, but is held illegally by both defendants. The defendant Julian, as Treasurer, is sued herein by virtue of the provisions of Section 9(a) of the Trading with the Enemy Act.

7. That said bank accounts and the moneys, funds and credits thereof were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

8. On or about June 2, 1948, plaintiff duly filed with the defendant Clark a Notice of Claim under oath, with respect to the aforesaid sum of Nine Hundred Seventy-five Thousand, Two Hundred Forty-four Dollars and Seventy Cents ($975,244.70), in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

9. Defendants are retaining the aforesaid sum of money, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and it should be returned to the plaintiff as the sole owner thereof.

WHEREFORE, plaintiff demands:

(1) Judgment that it is entitled to the return and immediate possession of the sum of Nine Hundred

Seventy-five Thousand, Two Hundred Forty-four Dollars and Seventy Cents ($975,244.70).

(2) Judgment that the defendants account for and deliver and pay over said sum of money to the plaintiff, together with all increment thereon, as well as interest upon said sum at the rate of six per centum (6%) per annum from June 24, 1946, and all right, title and interest therein.

(3) Judgment for the costs of this action.

FOURTH COUNT

1-3. Plaintiff incorporates into and makes a part of this count the averments contained in the first, second and third paragraphs of the first count of this Complaint.

4. On June 26, 1946, Hon. James E. Markham, as Alien Property Custodian, and the predecessor of the defendant Clark in this action, issued his Vesting Order No. 6767, whereby he illegally seized moneys, funds and credits in a certain account in the Bank of the Manhattan Company, New York City, N. Y., more fully described in said Vesting Order, and vested the same in himself as such Custodian. Plaintiff is informed and believes and therefore avers that the amount so seized and vested is not less than Three Hundred Eight Thousand, Seven Hundred Fifty Dollars ($308,750.00).

5. At all times on and prior to June 26, 1946, and continuously thereafter, plaintiff was and is the owner of the aforementioned moneys, funds and credits in said account and the only one entitled to the proceeds thereof.

6. That effective on, to-wit, October 15, 1946, by Executive Order No. 9788, the Office of Alien Property Custodian was terminated, and all authority, rights, privileges, powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be administered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds

thereof, were transferred to the Attorney General; and that, pursuant to said Executive Order, said sum of money is now held by one of the defendants in this action, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, and is deposited with and in the possession of the other defendant, William A. Julian, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant Clark, but is held illegally by both defendants. The defendant Julian, as Treasurer, is sued herein by virtue of the provisions of Section 9(a) of the Trading with the Enemy Act.

7. That the aforesaid moneys, funds and credits were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

8. On or about June 2, 1948, plaintiff duly filed with the defendant Clark a Notice of Claim under oath, with respect to the aforesaid sum of, to-wit, Three Hundred Eight Thousand, Seven Hundred Fifty Dollars ($308,750.00), in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

9. Defendants are retaining the aforesaid sum of money, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and it should be returned to the plaintiff as the sole owner thereof.

WHEREFORE, plaintiff demands:

(1) Judgment that it is entitled to the return and immediate possession of the sum of Three Hundred Eight Thousand, Seven Hundred Fifty Dollars ($308,750.00).

(2) Judgment that the defendants account for and deliver and pay over said sum of money to the plaintiff, together with all increment thereon, as well as interest upon said

sum at the rate of six per centum (6%) per annum
61 from June 26, 1946, and all right, title and interest therein.

(3) Judgment for the costs of this action.

FIFTH COUNT

1-3. Plaintiff incorporates into and makes a part of this count the averments contained in the first, second and third paragraphs of the first count of this Complaint.

4. On June 26, 1946, Hon. James E. Markham, as Alien Property Custodian, and the predecessor of the defendant Clark in this action, issued his Vesting Order No. 6768, whereby he illegally seized the sum of Four Hundred Two Thousand, Four Hundred Twelve Dollars and Fifty Cents ($402,412.50), comprising moneys, funds and credits in a certain account in The National City Bank of New York, New York City, N. Y., more fully described in said Vesting Order, and vested the same in himself as such Custodian.

5. At all times on and prior to June 26, 1946, and continuously thereafter, plaintiff was and is the owner of the aforementioned moneys, funds and credits in said account and the only one entitled to the proceeds thereof.

6. That, effective on, to-wit, October 15, 1946, by Executive Order No. 9788, the Office of Alien Property Custodian was terminated, and all authority, rights, privileges, powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be administered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds thereof, were transferred to the Attorney General; and that, pursuant to said Executive Order, said sum of money is now held by one of the defendants in this action, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, and is deposited with
62 and in the possession of the other defendant, William A. Julian, Treasurer of the United States, in an

account in the United States Treasury in the name of the defendant Clark, but is held illegally by both defendants. The defendant Julian, as Treasurer, is sued herein by virtue of the provisions of Section 9(a) of the Trading with the Enemy Act.

7. That the aforesaid moneys, funds and credits were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

8. On or about June 2, 1948, plaintiff duly filed with the defendant Clark a Notice of Claim under oath, with respect to the aforesaid sum of Four Hundred Two Thousand, Four Hundred Twelve Dollars and Fifty Cents ($402,412.50), in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

9. Defendants are retaining the aforesaid sum of money, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and it should be returned to the plaintiff as the sole owner thereof.

WHEREFORE, plaintiff demands:

(1) Judgment that it is entitled to the return and immediate possession of the sum of Four Hundred Two Thousand, Four Hundred Twelve Dollars and Fifty Cents ($402,412.50).

(2) Judgment that the defendants account for and deliver and pay over said sum of money to the plaintiff, together with all increment thereon, as well as interest upon said sum at the rate of six per centum (6%) per annum from June 26, 1946, and all right, title and interest therein.

(3) Judgment for the costs of this action.

63 SIXTH COUNT

1-3 Plaintiff incorporates into and makes a part of this count the averments contained in the first, second and third paragraphs of the first count of this Complaint.

4. On June 26, 1946, Hon. James E. Markham, as Alien Property Custodian, and the predecessor of the defendant Clark in this action, issued his Vesting Order No. 6769, whereby he illegally seized the sum of Forty-seven Thousand, One Hundred Twenty-five Dollars ($47,125.00), comprising moneys, funds and credits in a certain account in The National City Bank of New York, New York City, N. Y., more fully described in said Vesting Order, and vested the same in himself as such Custodian.

5. At all times on and prior to June 26, 1946, and continuously thereafter, plaintiff was and is the owner of the aforementioned moneys, funds and credits in said account and the only one entitled to the proceeds thereof.

6. That effective on, to-wit, October 15, 1946, by Executive Order No. 9788, the Office of Alien Property Custodian was terminated, and all authority, right, privileges, powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be administered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds thereof, were transferred to the Attorney General; and that, pursuant to said Executive Order, said sum of money is now held by one of the defendants in this action, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, and is deposited with and in the possession of the other defendant, William A. Julian, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant Clark, but is held illegally by both defendants. The defendant Julian,
64 as Treasurer, is sued herein by virtue of the provisions of Section 9(a) of the Trading with the Enemy Act.

7. That the aforesaid moneys, funds and credits were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

8. On or about June 2, 1948, plaintiff duly filed with the defendant Clark a Notice of Claim under oath, with respect to the aforesaid sum of Forty-seven Thousand, One Hundred Twenty-five Dollars ($47,125.00), in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

9. Defendants are retaining the aforesaid sum of money, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and it should be returned to the plaintiff as the sole owner thereof.

WHEREFORE, plaintiff demands:

(1) Judgment that it is entitled to the return and immediate possession of the sum of Forty-seven Thousand, One Hundred Twenty-five Dollars ($47,125.00).

(2) Judgment that the defendants account for and deliver and pay over said sum of money to the plaintiff, together with all increment thereon, as well as interest upon said sum at the rate of six per centum (6%) per annum from June 26, 1946, and all right, title and interest therein.

(3) Judgment for the costs of this action.

SEVENTH COUNT

1-3. Plaintiff incorporates into and makes a part of this count the averments contained in the first, second and third paragraphs of the first count of this Complaint.

65 4. On October 14, 1946, Hon. James E. Markham, as Alien Property Custodian, and the predecessor of the defendant Clark in this action, issued his Supplementary Vesting Order No. 7874, whereby he illegally undertook to seize and vest in himself as such Custodian the sum of One Hundred Eight Thousand, Seven Hundred Fifty Dollars ($108,750.00), comprising moneys, funds and credits in a certain account in the Chase National Bank of the City of New York, N. Y., more fully described in said Vesting Order.

5. That effective on, to-wit, October 15, 1946, by Executive Order No. 9788, the Office of Alien Property Custodian

was terminated, and all authority, rights, privileges, powers, duties and functions vested in said Office or Custodian, or transferred or delegated thereto, were vested in and transferred and delegated to the Attorney General, to be administered by him, and all property and interests vested in and transferred to the Alien Property Custodian, or seized by him, and all proceeds thereof, were transferred to the Attorney General.

6. On February 16, 1948, one of the defendants, namely, Hon. Tom C. Clark, Attorney General of the United States, as the successor to the Alien Property Custodian, issued an amendment to said Vesting Order No. 7874, and pursuant thereto and to the aforesaid Executive Order, the defendant Clark illegally seized the said sum of One Hundred Eight Thousand, Seven Hundred Fifty Dollars ($108,750.00), comprising the moneys, funds and credits described in paragraph 4 of this count and more fully described in said Vesting Order; and said sum of money is now held by the defendant Clark, and is deposited with and in the possession of the other defendant, William A. Julian, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant Clark, but is held wrongfully and illegally by both defendants. The defendant Julian, as Treasurer, is sued herein by virtue of the provisions of Section 9(a) of the Trading with the Enemy Act.

7. At all times on and prior to October 14, 1946, and continuously thereafter to the present date, plaintiff was and is the owner of the aforementioned moneys, funds and credits in said account and the only one entitled to the proceeds thereof.

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8. That the aforesaid moneys, funds and credits were seized and vested and are being held without warrant of law and in violation of the Constitution of the United States, and without the consent of the plaintiff.

9. On or about June 2, 1948, plaintiff duly filed with the defendant Clark a Notice of Claim under oath, with respect

to the aforesaid sum of One Hundred Eight Thousand, Seven Hundred Fifty Dollars ($108,750.00), in the form and containing the particulars required by the Alien Property Custodian or by the defendant Clark as his successor.

10. Defendants are retaining the aforesaid sum of money, owned by and belonging to the plaintiff, without warrant of law and in violation of the Constitution of the United States, and it should be returned to the plaintiff as the sole owner thereof.

WHEREFORE, plaintiff demands:

(1) Judgment that it is entitled to the return and immediate possession of the sum of One Hundred Eight Thousand, Seven Hundred Fifty Dollars ($108,750.00).

(2) Judgment that the defendants account for and deliver and pay over said sum of money to the plaintiff, together with all increment thereon, as well as interest upon said sum at the rate of six per centum (6%) per annum from October 14, 1946, and all right, title and interest therein.

(3) Judgment for the costs of this action.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A. (Also known as INTERNATIONALE INDUSTRIE- & HANDELSBETEILIGUNGEN A. G.); and formerly named INTERNATIONALE GESELLSCHAFT FUR CHEMISCHE UNTERNEHMUNGEN A. G. (I.G. CHEMIE), and SOCIETE INTERNATIONALE POUR ENTREPRISES CHIMIQUES S. A. (I. G. CHEMIE)
By JOHN J. WILSON, Its Attorney

(Filed Jan. 26, 1950)

68 **Answer Amended in Accordance with Orders of the Court.**

The defendants, J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and Georgia

Neese Clark, Treasurer of the United States, for their answer to the complaint herein:

Deny each and every allegation contained in the counts and paragraphs of the complaint (and not merely the allegations of paragraphs which are in their entirety expressly denied below), except those paragraphs or allegations as are hereinafter expressly, and not by implication, admitted.

With respect to the specific counts and paragraphs of the complaint, the defendants

FIRST COUNT

1. Admit that the action purports to be brought and the jurisdiction of the court is invoked under the Fifth Amendment to the Constitution of the United States and the Trading with the Enemy Act, as amended (U. S. Code, Title 50, Appendix, Section 1, *et seq.*), and particularly Section 9(a) thereof.

2. Admit, on information and belief, that the plaintiff is a corporation organized under the laws of Switzerland and that its name has been changed from Internationale
69 Gesellschaft für Chemische Unternehmungen A.G. (I.G. Chemie), and Societe Internationale pour Enterprises Chimiques S.A. (I.G. Chemie), to Societe Internationale pour Participations Industrielles et Commerciales S.A. and Internationale Industrie- & Handelsbeteiligungen A.G.; and it is now commonly sometimes called "Interhandel".

3. Deny the allegations of Paragraph 3.

4. Admit, on information and belief, that 2,050,000 shares of the Common B stock, and 455,448 shares of the Common A stock of General Aniline & Film Corporation may have a value in excess of One Hundred Million Dollars ($100,000,000.00).

5. Admit that on February 16, 1942, the Secretary of the Treasury executed and issued a Vesting Order whereby, *inter alia*, shares of General Aniline & Film Corporation of the description and number referred to in Paragraph 4, First Count, *supra*, were vested under the Trading with

the Enemy Act and Executive Orders and regulations issued thereunder. Said Vesting Order is filed with and published in the Federal Register (7 F.R. 1046). A certified copy thereof is attached hereto as Exhibit A and by this reference is incorporated herein.

Admit that on April 24, 1942, the Alien Property Custodian executed and issued Vesting Order No. 5, whereby the shares of stock of General Aniline & Film Corporation covered by the aforementioned Vesting Order issued by the Secretary of the Treasury on February 16, 1942, were vested, under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder. Said Vesting Order No. 5 is filed with and published in the Federal Register (7 F.R. 3148). A certified copy thereof is attached hereto as Exhibit B and by this reference is incorporated herein.

Admit that pursuant to said Vesting Order No. 5 the Secretary of the Treasury delivered, transferred and assigned to the Alien Property Custodian, *inter alia*, shares of stock of General Aniline & Film Corporation of the description and number referred to in Paragraph 4, First Count, *supra*.

6. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to said Executive Order shares of stock of the General Aniline & Film Corporation of the description and number referred to in Paragraph 4, First Count, *supra*, and vested under the aforementioned Vesting Order of February 16, 1942, and under the aforementioned Vesting Order No. 5, were transferred to and are now in the possession of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian.

7. Admit that shares of stock of the description and number referred to in Paragraph 4, First Count, *supra*,

and vested under the Vesting Order of February 16, 1942 and under Vesting Order No. 5, were seized, vested and are being held without the consent of the plaintiff.

8. Admit that on or about February 1, 1943, the plaintiff filed with the then Office of Alien Property Custodian a document under oath, in the form required by the Alien Property Custodian, entitled "Notice of Claim for Return of Property" with respect to 455,448 shares of the A stock and 2,050,000 shares of the B stock of the General Aniline & Film Corporation and all dividends and increment on said shares, vested under Vesting Order No. 5.

Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant J. Howard McGrath, entitled "Notice of Claim for Return of Property" with respect to the aforesaid stock, dividends and increment.

9. Deny the allegations of Paragraph 9.

71 10. Admit that plaintiff purports to sue the defendant Georgia Neese Clark, Treasurer of the United States, under Section 9(a) of the Trading with the Enemy Act, and that cash dividends received by the defendant J. Howard McGrath, Attorney General, as successor to the Alien property Custodian, and his predecessors as Alien Property Custodian on the shares of stock vested by Vesting Order No. 5 are on deposit with defendant Clark in an account in the United States Treasury in the name of J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian.

SECOND COUNT

1-3. The defendants repeat the allegations and denials of their answer made in Paragraphs 1 to 3, First Count, *supra*.

4. Admit, on information and belief, that 176 shares of the Common A stock of General Aniline & Film Corpora-

tion may have a value in excess of Thirty-five Thousand Dollars ($35,000.00).

5. Admit that on February 15, 1943, the Alien Property Custodian executed and issued Vesting Order No. 907, whereby, *inter alia*, 176 shares of the Common A stock of the General Aniline & Film Corporation were vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder. Said Vesting Order is filed with and published in the Federal Register (8 F.R. 2453). A certified copy thereof is attached hereto as Exhibit C and by this reference is incorporated herein.

6. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to said Executive Order shares of stock of the description and number referred to in Paragraph 4, Second Count, *supra*, and vested under Vesting Order No. 907, were transferred to the predecessor of and are now in the possession of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian.

72 7. Admit that the shares of stock of the description and number referred to in Paragraph 4, Second Count, *supra*, and vested under Vesting Order No. 907, were seized, vested and are being held without the consent of the plaintiff.

8. Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant J. Howard McGrath, entitled "Notice of Claim for Return of Property" with respect to 176 shares of the A stock of the General Aniline & Film Corporation and all dividends and increment on said shares, vested under Vesting Order No. 907.

9. Deny the allegations of Paragraph 9.

10. Admit that plaintiff purports to sue the defendant Georgia Neese Clark, Treasurer of the United States, under Section 9(a) of the Trading with the Enemy Act, and that cash dividends received by the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and his predecessors as Alien Property Custodian on the shares of stock vested by Vesting Order No. 907 are on deposit with defendant Clark in an account in the United States Treasury in the name of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian.

THIRD COUNT

1-3. The defendants repeat the allegations and denials of their answer made in Paragraphs 1 to 3, First Count, *supra*.

4. Admit that on June 24, 1946, the Alien Property Custodian executed and issued Vesting Order No. 6718 whereby certain debts or other obligations arising out of current accounts entitled "Internationale Gesellschaft fuer Chemische Unternehmungen A.G." at the Bank of the Manhattan Company, the Irving Trust Company, the Credit Suisse, New York Agency, and the Swiss Bank Corporation, New York Agency, were vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder, and that pursuant to said Vesting Order
73 the Alien Property Custodian was paid the sum of Nine Hundred Seventy-Four Thousand, Three Hundred Thirteen Dollars and Eighty-Seven Cents ($974,313.87). The sums received from said banks are respectively:

Bank of the Manhattan Company	$182,089.90
Irving Trust Company	186,300.08
Credit Suisse, New York Agency	288,179.07
Swiss Bank Corporation, New York Agency	317,744.82
	$974,313.87

Said Vesting Order No. 6718 is filed with and published in the Federal Register (11 F.R. 7643). A certified copy thereof is attached hereto as Exhibit D and by this reference is incorporated herein.

5. Deny the allegations of Paragraph 5.

6. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to said Executive Order the aforementioned sum of money paid to the Alien Property Custodian pursuant to Vesting Order No. 6718 was transferred to the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and is on deposit with defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant McGrath, as successor to the Alien Property Custodian.

Admit that the action purports to be brought against the defendant Clark, as Treasurer, under Section 9(a) of the Trading with the Enemy Act.

7. Admit that the aforementioned sum of money was seized, vested and is being held without the consent of the plaintiff.

8. Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant, J. Howard McGrath, entitled "Notice of Claim for Return of Property" with respect to $975,244.70, alleged to have been vested under
74 Vesting Order No. 6718.

9. Deny the allegations of Paragraph 9.

FOURTH COUNT

1-3. The defendants repeat the allegations and denials of their answer made in paragraphs 1 to 3, First Count, *supra*.

4. Admit that on June 26, 1946 the Alien Property Custodian executed and issued Supplemental Vesting Order No. 6767, whereby a certain debt or other obligation arising out of a current account entitled "N. V. Maatschappij voor Industrie en Handelsbelangen" at the Bank of the Manhattan Company was vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder, and that pursuant to said Vesting Order the Alien Property Custodian was paid the sum of Two Hundred Forty-Two Thousand, Seven Hundred Thirty-Six Dollars and Nineteen Cents ($242,736.19).

Said Supplemental Vesting Order No. 6767 is filed with and published in the Federal Register (11 F.R. 7733). A certified copy thereof is attached hereto as Exhibit E and by this reference is incorporated herein.

5. Deny the allegations of Paragraph 5.

6. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to said Executive Order the aforementioned sum of money paid to the Alien Property Custodian pursuant to Supplemental Vesting Order No. 6767, was transferred to the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and is on deposit with defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant McGrath as successor to the Alien

75 Property Custodian.

Admit that the action purports to be brought against the defendant Clark, as Treasurer, under Section 9(a) of the Trading with the Enemy Act.

7. Admit that the aforementioned sum of money was seized, vested and is being held without the consent of the plaintiff.

8. Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant J. Howard McGrath, entitled "Notice of Claim for Return of Property" with respect to $308,750.00, alleged to have been vested under Supplemental Vesting Order No. 6767.

9. Deny the allegations of Paragraph 9.

FIFTH COUNT

1-3. The defendants repeat the allegations and denials of their answer made in Paragraphs 1 to 3, First Count, *supra*.

4. Admit that on June 26, 1946, the Alien Property Custodian executed and issued Supplemental Vesting Order No. 6768, whereby a certain debt or other obligation of General Aniline & Film Corporation for the payment of which said Corporation deposited $402,412.50 with the National City Bank of New York, in a trust account at the said bank, entitled

> General Aniline & Film Corporation, in trust for the owners of 900,000 shares of Common B stock of General Aniline & Film Corporation, registered in the names of Chemo Maatschappij voor Chemische Ondernemingen, Amsterdam, Holland and N. V. Maatschappij voor Industrie en Handelsbelangen, Amsterdam, Holland.

was vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder; and that pursuant to said Vesting Order, the Alien Property Custodian was paid the sum of Four Hundred Two

Thousand, Four Hundred Twelve Dollars and Fifty Cents ($402,412.50).

76 Said Supplemental Vesting Order No. 6768 is filed with and published in the Federal Register (11 F.R. 7733). A certified copy thereof is attached hereto as Exhibit F and by this reference is incorporated herein.

5. Deny the allegations of Paragraph 5.

6. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to said Executive Order the aforementioned sum of money paid to the Alien Property Custodian pursuant to Supplemental Vesting Order No. 6768, was transferred to the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and is on deposit with defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury in the name of the defendant McGrath, as successor to the Alien Property Custodian.

Admit that the action purports to be brought against the defendant Clark, as Treasurer, under Section 9(a) of the Trading with the Enemy Act.

7. Admit that the aforementioned sum of money was seized, vested, and is being held without the consent of the plaintiff.

8. Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant J. Howard McGrath, entitled "Notice of Claim for Return of Property" with respect to $402,412.50, vested under Supplemental Vesting Order No. 6768.

9. Deny the allegations of Paragraph 9.

77 SIXTH COUNT

1-3. The defendants repeat the allegations and denials of their answer made in Paragraphs 1 to 3, First Count, *supra*.

4. Admit that on June 26, 1946, the Alien Property Custodian executed and issued Supplemental Vesting Order No. 6769 whereby a certain debt or other obligation of General Aniline & Film Corporation for the payment of which said Corporation deposited $47,125.00 with the National City Bank of New York in a trust account at the said bank, entitled "General Aniline & Film Corporation, in Trust for ultimate beneficiaries of 650,000 shares of Common B stock of General Aniline & Film Corporation registered in the name of L. D. Pickering & Co.", was vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder; and that pursuant to said Vesting Order the Alien Property Custodian was paid the sum of Forty-Seven Thousand, One Hundred Twenty-Five Dollars ($47,125.00).

Said Supplemental Vesting Order No. 6769 is filed with and published in the Federal Register (11 F.R. 7734). A certified copy thereof is attached hereto as Exhibit G and by this reference is incorporated herein.

5. Deny the allegations of Paragraph 5.

6. Admit that by virtue of Executive Order 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to said Executive Order the aforementioned sum of money paid to the Alien Property Custodian pursuant to Supplemental Vesting Order No. 6769, was transferred to the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and is on deposit with defendant Georgia Neese Clark, Treasurer of the United States, in

an account in the United States Treasury in the name of the defendant McGrath, as successor to the Alien Property Custodian.

78 Admit that the action purports to be brought against the defendant Clark, as Treasurer, under Section 9(a) of the Trading with the Enemy Act.

7. Admit that the aforementioned sum of money was seized, vested and is being held without the consent of the plaintiff.

8. Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant J. Howard McGrath, entitled "Notice of Claim for Return of Property" with respect to $47,125.00, vested under Supplemental Vesting Order No. 6769.

9. Deny the allegations of Paragraph 9.

SEVENTH COUNT

1-3. The defendants repeat the allegations and denials of their answer made in Paragraphs 1-3, First Count, *supra*.

4. Admit that on October 14, 1946, the Alien Property Custodian executed and issued Supplemental Vesting Order No. 7874, whereby

> An obligation in the amount of $108,750.00 owed by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, to Union Bank of Switzerland, Zurich, Switzerland, constituting a portion of an account entitled "Union Bank of Switzerland, Zurich, Switzerland", maintained at the aforesaid bank, together with any and all rights to demand, enforce and collect the same,

was vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder.

Said Supplemental Vesting Order No. 7874 was filed with and published in the Federal Register (11 F.R. 13887). A

certified copy thereof is attached hereto as Exhibit H and by this reference is incorporated herein.

5. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

79 6. Admit that on February 16, 1948 the predecessor of J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, executed and issued an amendment to Vesting Order No. 7874, whereby the description of the property vested by Supplemental Vesting Order No. 7874 was amended to read:

> That certain debt or other obligation of the Chase National Bank of the City of New York, 18 Pine Street, New York, New York, in the amount of $108,750.00, arising out of an account entitled Union Bank of Switzerland, Blocked Germany and Switzerland, Zurich, Switzerland, maintained at foresaid The Chase National Bank of the City of New York, and any and all rights to demand, enforce and collect the same.

Said amendment to Vesting Order No. 7874 was filed with and published in the Federal Register (13 F.R. 1180). A certified copy thereof is attached hereto as Exhibit I and by this reference is incorporated herein.

Admit that pursuant to said Vesting Order No. 7874 and said amendment to Vesting Order No. 7874 the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, was paid the sum of One Hundred Eight Thousand, Seven Hundred Fifty Dollars ($108,750.00).

Admit that the said sum is on deposit with defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury, in the name of the defendant McGrath, as successor to the Alien Property Custodian.

Admit that the action purports to be brought against the defendant Clark, as Treasurer, under Section 9(a) of the Trading with the Enemy Act.

7. Deny the allegations of Paragraph 7.

8. Admit that the aforementioned sum of money was seized, vested and is being held without the consent of the plaintiff.

9. Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, a document under oath, in the form required by the predecessor of the defendant J. Howard McGrath, entitled "Notice of Claim for Return of Property", with respect to $108,750.00, vested by Vesting Order No. 7874, as amended.

10. Deny the allegations of Paragraph 10.

80 FIRST SEPARATE DEFENSE

1. Upon information and belief, the defendants allege that between about 1928, the exact date being unknown to the defendants, and the surrender of Germany in 1945, and thereafter to a time unknown to the defendants, the plaintiff engaged in and participated in a conspiracy or common plan, which had been in existence since about 1920, with I. G. Farben, Ed. Greutert et Cie., Basle, Switzerland (and its successor firm, H. Sturzenegger et Cie.), and others unknown to the plaintiff. Among the co-conspirators were the subsidiary, predecessor and controlled companies of the plaintiff, of I. G. Farben, of H. Sturzenegger et Cie., and the officers, directors, stockholders, agents, and representatives of the co-conspirators. The ultimate purpose and objective of said conspiracy or common plan was to conceal, camouflage and cloak the ownership, control, and domination by I. G. Farben of properties and interests in many countries of the world, including the United States, other than Germany. Among the various purposes and objectives of the said conspiracy were to assist I. G. Farben:

(a) To escape, avoid, or evade the tax laws of the German government;

(b) To escape, avoid or evade the tax laws, the laws aimed at foreign-owned property and other laws of the countries in which said properties and interests were located;

(c) To create and maintain reserves of properties and interests which could be realized in non-German, sound currencies;

(d) To avoid the effect of anti-German and anti-foreign sentiments, including boycotts of German and foreign-made goods, in the countries in which said properties and interests were located;

(e) To conceal, camouflage and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany.

81 In the purposes and objectives stated under (d) and (e) above, the named conspirators conspired with the government of the German Reich.

2. To effectuate the said conspiracy or common plan, the named conspirators and others, deceased and unknown to the defendants, used divers plans, means, methods, acts and devices, including but not limited to, the following:

(a) Caused the plaintiff to be organized in the year 1928;

(b) Caused blocks of stock in the plaintiff to be issued to, transferred among, and held by corporations, partnerships, consortia and individuals owned, controlled or dominated by I. G. Farben;

(c) Caused General Aniline & Film Corporation (originally known as American I. G. Chemical Corporation) to be organized in the year 1929;

(d) Thereafter caused blocks of the stock of the General Aniline & Film Corporation to be issued to, transferred among, and held by corporations, partner-

ships, consortia and individuals owned, controlled or dominated by I. G. Farben;

(e) Caused corporations to be organized and stock to be issued to, transferred among, and held by the co-conspirators and others; caused the management, control and operation of corporations and partnerships to be entrusted to agents, representatives and associates of I. G. Farben and others responsible and loyal to I. G. Farben; caused, for these purposes, agreements to be made by and between the co-conspirators; caused loans and options to be given and taken with respect to the purchase and sale of stock, stock certificates to be secreted, applications to be made and favorably acted upon by the government of the German Reich; at various times unknown to the defendants and in details unknown to the defendants;

82 (f) Caused to be executed agreements and contracts affecting subsidiary, associate and independent corporations, partnerships, associations and individuals, with respect to sales, patents, patent licenses, technical experience, know-how and other matters for the purpose of retaining, holding and exercising control and domination by I. G. Farben of such subsidiary, associate and independent corporations, partnerships, associations and individuals, at various times unknown to the defendants and in details unknown to the defendants;

(g) Held meetings and discussions in Germany, Switzerland, the United States and other places unknown to the defendants, at various times unknown to the defendants and in details unknown to the defendants.

3. By reason of the foregoing, the plaintiff and the property claimed by the plaintiff are enemy and enemy tainted, and, therefore, the plaintiff has no standing to institute or maintain this action.

* * * * * * * * *

Filed April 13, 1950

130 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC. (I. G. CHEMIE),

Plaintiff,

v.

J. HOWARD MCGRATH, ET AL.,

Defendants,

REMINGTON RAND, INC.,

Intervenor Plaintiff,

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all persons similarly situated,

Applicants for Intervention.

Civil Action No. 4360-48

Affidavit

DISTRICT OF COLUMBIA, SS:

Archer Henrick, being duly sworn, deposes and says:

I am the Records Officer of the Office of Alien Property, Department of Justice. As such Records Officer I have custody of the files of the Office of Alien Property, Department of Justice, including the files containing notices of claims filed with respect to vested property; that I have caused a diligent search to be made of the files of the Office of Alien Property, Department of Justice, for notices of claims filed by or on behalf of any claimants on the ground that claimants are or were stockholders of Societe Internationale Pour Participations Industrielles et Commerciales S.A., formerly named Internationale Gesellschaft Für Chemische Unternehmungen A. G. (I. G. Chemie), a corporation of Basle, Switzerland; and that as of this date

131 the only such claims filed with the Office of Alien Property, Department of Justice, are as follows:

No. 3741—Steven van Wezel, filed April 4, 1945, for General Aniline & Film Corporation stock equivalent to the value of 15 shares of I. G. Chemie.

No. 18127—Paul Lowenstein, filed August 27, 1947, for $4520 against I. G. Farbenindustrie for proceeds of forced sale including shares of I. G. Chemie, Basle, valued at sfrs. 4500.00.

No. 36736—Eric G. Kaufman and Aenni C. Kaufman and two minor children, filed June 15, 1948, as owners of 84 shares of I. G. Chemie for a proportionate share of stock of General Aniline & Film Corporation.

No. 501—General Aniline & Film Corporation, filed March 18, 1943, for $12,193,190.98 as owner of approximately 36.2% of the total paid-in common stock of I. G. Chemie.

All claims filed with the Office of Alien Property are open to public inspection.

Dated: April 11, 1950.

ARCHER HENRICK.

Sworn to before me this 11th day of April, 1950.

JOHN C. HILL,
Notary Public.

My commission expires the 30th day of Nov., 1951.

Filed May 24, 1950

147 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., *Plaintiff*,

vs.

J. HOWARD MCGRATH, ET AL., *Defendants*,

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all persons similarly situated, *Applicants for Intervention*.

Civil Action No. 4360-48

Memorandum Opinion

The present motion, filed by Eric G. Kaufman and Aenni C. Kaufman, seeks authority of the Court to intervene in these proceedings. These petitioners base their claim for intervention upon the fact that they are the owners of 86 shares of the capital stock of the plaintiff herein. Their status, according to their motion, is that they are not enemies, enemy nationals, allies of enemies or nationals of allies of enemies within the meaning of the "Trading With The Enemy Act". The petitioners claim that they desire to intervene not only on their own behalf but on behalf of all other persons similarly situated; i.e., stockholders of the plaintiff who, like the movants, are not now and have not been since December 6, 1941, enemies, etc. within the meaning of the "Trading With The Enemy Act".

A few days prior to the filing of their present motion, these same petitioners filed in the Southern District of New York a complaint against J. Howard McGrath, Attorney

General of the United States. In that complaint, petitioners, as owners of 86 shares of the capital stock of the plaintiff in the present action seek, under Section 9 of the "Trading With The Enemy Act" (50 USCA 9), to obtain a judicial declaration that they are entitled to the ownership, possession and enjoyment of their proportionate
148 share of the property and funds seized by the Alien Property Custodian from the plaintiff in the current action. No decision has yet been rendered in the case pending in the Southern District of New York.

Both the plaintiff and the defendant oppose the motion of the petitioners for leave to intervene herein, and the matter has been argued fully by counsel for the petitioners, as well as counsel for the plaintiff and the defendant.

There is a general practice in this and other Federal Courts to take a liberal view towards motions to intervene, upon the apparent assumption that no substantial harm results from the granting of such motions. It is apparently felt that if the intervenor does not have a substantial right or interest in the proceedings, the ultimate disposition of the case will eliminate him without injury to the principal parties. This Court feels, however, that petitions or motions to intervene should be carefully scrutinized and granted only in cases in which there is either a legal right to intervene or in cases in which the motion definitely establishes that the petitioner has some interest or right which will not be adequately protected or enforced unless intervention is granted.

In the present proceeding the Court has carefully studied the nature and status of the substantive case, not only as between the present plaintiff and defendant, but also insofar as it relates to the interests of the petitioners as stockholders in the plaintiff corporation. The memoranda of points and authorities, as well as counsels' arguments, devote considerable attention to the question of whether the parties seek to intervene in a representative or in a derivative capacity. Counsel have argued as to the applicability or non-applicability, depending upon their view-

points, of Rules 23 and 24 of the Federal Rules of Civil Procedure.

From all of the data and authorities cited to the Court, it is the Court's conclusion that the facts appear to establish that the petitioners' action is definitely upon a representative basis. Assuming that this conclusion is
149 correct, the Court rules that the petitioners have failed to establish their status in a representative capacity to intervene in this action. Appraising the pleadings and argument from a different viewpoint and assuming for the purpose of analysis that the petitioners seek to intervene upon a derivative basis, the Court finds that they are without legal status in this regard and not entitled to intervene.

The Court concludes that whether the petitioners predicate their motion to intervene either upon a representative or a derivative foundation, they are without proper status in either category to support their petition and, accordingly, the Motion to Intervene is denied.

Counsel will present appropriate Order.

EDWARD A. TAMM,
Judge.

Dated: May 24, 1950.

151 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC.
Plaintiff

v.

J. HOWARD MCGRATH, ET AL.,
Defendants

REMINGTON RAND, INC.,
Intervenor.

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all persons similarly situated
Applicants for Intervention

Civil Action No. 4360-48

Filed, May 26, 1950

Stipulation

It is hereby stipulated among the parties hereto that the benefits of settlement in this action shall be held by the corporation under the control of this Court for the benefit of its non-enemy stockholders as determined by this Court, after satisfaction of any corporate debts attributable thereto.

Dated at Washington, D. C., May 23rd, 1950.

.....
Attorney for Plaintiff

.....
Attorney for Defendants

WILLIAM RADNER,
Attorney for Applicants for Intervention

152 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC.,
Plaintiff

v.

J. HOWARD MCGRATH, ET AL.,
Defendants

REMINGTON RAND, INC.,
Intervenor

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN *and* RUTH MIRJAM KAUFMAN, and on behalf of all persons similarly situated,
Applicants for Intervention

Civil Action No. 4360-48

Filed, May 26, 1950

Stipulation

It is hereby stipulated among the parties hereto that the defendants herein may sell at public sale at any time the stock of General Aniline & Film Corporation without regard to the provisions of the Trading with the Enemy Act and that the proceeds of the sale shall instead be subject to the disposition of this action.

Dated at Washington, D. C., May 23rd, 1950.

.....
Attorney for Plaintiff

.....
Attorney for Defendants

WILLIAM RADNER,
Attorneys for Applicants for Intervention

153 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC. (I. G. CHEMIE),
Plaintiff

v.

J. HOWARD MCGRATH, ET AL.,
Defendants

REMINGTON RAND, INC.,
Intervenor

ERIC G. KAUFMAN and AE[illegible]I C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all stockholders of plaintiff similarly situated
Applicants for Intervention

Civil Action No. 4360-48

Filed, June 5, 1950

Consolidated Motion for Rehearing and to Alter or Amend Judgment Denying Motion for Leave to Intervene.

The applicants for intervention herein move the Court in the alternative as follows:

1. To vacate the judgment denying applicants' Motion for Leave to Intervene entered May 26, 1950, and for rehearing of such Motion on the grounds that:

(a) Neither in their opposing memoranda, affidavit nor oral argument, indeed nowhere in the proceedings thus far upon the Motion to Intervene have either plaintiff or defendants in any way challenged or questioned applicants' allegations that the settlement proposed will be for a sum far below the full and fair value of the properties involved and will be effected in such manner as to benefit enemy stockholders of plaintiff at the expense of non-enemy stock-

holders. These allegations have always been and are a principal basis of applicants' complaint herein, and
154 any denial of an opportunity to establish them would be a grave injustice to applicants and other non-enemy stockholders, under the Trading With the Enemy Act.

(b) The Court was in error in holding that applicants herein do not have "proper status" to present their claims in intervention in any capacity, because (1) applicants were stockholders of plaintiff at the time of all transactions complained of by them, (2) the action complained of impaired the rights of plaintiff and applicants under the Trading With the Enemy Act admitting, for the purpose of applicants' motion, the validity of the claims made, and (3) with respect to the claim of illegal settlement, the interests of applicants are so vitally affected that without regard to the question whether the intervention is representative, derivative, or otherwise, the applicants have "proper status" to assert and have the opportunity to establish the illegality claimed.

(c) The argument of defendants, adopted by plaintiff, that a stockholder's intervention can not be derivative unless for the benefit of all stockholders of the corporation was first made in a memorandum served at about 4 P.M. the day before the argument on the said motion. Applicants had insufficient opportunity to obtain reference to the numerous cases holding to the contrary, and the argument of defendants may have weighed heavily with the Court. Some of the leading cases so holding are as follows: *Brown v. De Young*, 167 Ill. 549, 47 N.E. 863 (1897); *Matthews v. Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645 (1917); *Backus v. Finkelstein*, 23 F. (2d) 357 (D. Minn. 1927), app. dismissed, 31 F. (2d) 1011 (CCA 8th, 1929); *Joyce v. Congdon*, 114 Wash. 239, 195 P. 29 (1921).

(d) From the Court's Memorandum Opinion in the above entitled matter, it would appear that the Court relied in some measure upon the pendency in the United States

District Court for the Southern District of New York of an action brought by intervenors Kaufman solely in their own behalf as individuals and in neither a derivative nor a representative capacity against one of the defendants herein to recover a proportionate share of the properties of
155 plaintiff corporation vested under the Trading With the Enemy Act. It would appear that in so doing the Court has failed to give proper consideration to the affidavit of plaintiff in the said action in the Southern District of New York which was filed in this proceeding to the effect that the sole purpose of said action in the Southern District of New York was to toll the statute of limitations in the event it should be ultimately determined in the principal action herein that the right to recover under Section 9(a) of the Trading With the Enemy Act is not that of the corporation but rather of its stockholders. Moreover, the Court has apparently failed to consider in that connection that it is the position of plaintiff and defendants in the principal action that the sole right to recover the properties here involved under the provisions of the Trading With the Enemy Act is in the plaintiff corporation.

(e) From the Court's Memorandum Opinion in the above entitled matter dated May 24, 1950, it would appear that the Court has not considered the applicability of Rule 24(a)(3) F.R.C.P., which permits intervention as of right "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is . . . subject to the control or disposition of the court . . .", and which was relied upon by applicants equally with Rule 24(a)(2) F.R.C.P.

2. To alter or amend the judgment entered May 26, 1950 so as to grant applicants leave to file the Amended Motion for Leave to Intervene and Amended Proposed Complaint attached hereto, on the grounds that:

(a) It is not the purpose of the Federal Rules of Civil Procedure, as a general rule, to foreclose litigants such as applicants herein in the pleading stages of a case without

leave to amend, particularly where, as here, the principal action is not yet at issue and no substantial injury or inconvenience will be done to the other parties to the action. On the other hand, the grave injustice that may be done to applicants and other non-enemy stockholders of plaintiff by foreclosing them from establishing the claims asserted in the attached Amended Proposed Complaint has been shown above and is otherwise obvious. In any event, applicants are entitled as a matter of right to file the Amended Motion for Leave to Intervene, since no responsive pleading has as yet been filed.

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(b) To the extent that the Memorandum Opinion in this matter relied upon the failure of the original proposed complaint to make the allegation required for an original derivative action by the provisions of Rule 23 F.R.C.P., the first and second counts of the Amended Proposed Complaint contain those allegations in paragraphs 13 and 9, respectively. Applicants consider these allegations to be wholly superfluous on intervention under the provisions of Rule 24(a). Nevertheless, since an issue thereon was raised by plaintiff and defendants which does not go to the merits of applicants' claim, and since the facts are such that the necessary allegations can with all propriety be made by applicants, and since it appears that reference to Rule 23 is made in the Memorandum Opinion in this matter, applicants have complied with the requirements of Rule 23, without thereby waiving their right to assert the inapplicability of that rule.

(c) The Amended Proposed Complaint consists of three counts, the first and second counts being derivative and the third count being brought without regard to whether the nature of the claim is derivative, representative, or otherwise. The allegations and prayer of the original proposed complaint upon which plaintiff and defendants relied in arguing the applicants' failure to state a derivative action have been eliminated, and the Amended Proposed Complaint contains allegations sufficient to indicate unequi-

vocally—as indeed we believe did the allegations of the original complaint—that the claims therein asserted are on behalf of the corporation and for the benefit of the corporation insofar as it is entitled to the return of any property under the Trading With the Enemy Act. The first and second counts of the proposed complaint are based upon the law that an action, whether in intervention or otherwise, is no less derivative because certain shareholders of the corporation are ineligible in equity to share in the benefits thereof. The first count alleges a claim on behalf of the plaintiff corporation which the management of the corporation refuses to make. The second count alleges on behalf of the corporation that its management is about to
157 consummate an unlawful settlement at less than the full and fair value of the claim involved and to the detriment of the corporation, because of a conflict of interest as between the management and substantial segments of the corporation's stockholders. The third count is intended to point up the fact that without regard to the question as to the derivative or representative nature of the relief requested, applicants for intervention and other stockholders similarly situated will be irreparably injured by an impending illegal settlement between plaintiff and defendants herein and have no adequate remedy to redress such injury except by intervention in the principal action in this Court.

Although it is the position of applicants herein that these claims were inherent in its original proposed complaint, they have been separated and expanded in the light of the Memorandum Opinion of this Court above referred to in order to make it clearer that applicants are entitled as a matter of right to intervene herein. Particularly, the proposed pleading has been expanded to state specifically the reasons why applicants' interests are inadequately repre-

sented by the parties in the main action and especially the management of the plaintiff herein.

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158 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC.,
Plaintiff

v.

J. HOWARD MCGRATH, ET AL.,
Defendants

REMINGTON RAND, INC.,
Intervenor

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all stockholders of the plaintiff similarly situated,

802 West 190th Street
New York 33, New York
Applicants for Intervention

Civil Action No. 4360-48

Amended Motion for Leave to Intervene

Eric G. Kaufman and Aenni C. Kaufman, hereinafter referred to as "applicants", move for leave to intervene as plaintiffs in this action, on their own behalf and on behalf of all stockholders of the plaintiff similarly situated, on the grounds that (1) applicants have a substantial interest in the subject matter of this action, the representation of their interest by the present parties to this action is inadequate, and applicants will be bound by a judgment in the action, and (2) applicants may be adversely affected by a distribution or other disposition of property subject to the control o disposition of the Court in this action. In support of this motion applicants represent as follows:

159 1. Applicants, individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman, are and at all times mentioned herein have been the sole and beneficial owners for value, of 86 shares of the capital stock of the plaintiff herein. Applicants are not now, and have not been at any time since December 6, 1941, enemies, enemy nationals, allies of enemies, nationals of allies of enemies, nationals of a designated enemy country, or nationals of Germany or Japan within the meaning of the Trading With the Enemy Act, as amended, and are not now and have not been since December 6, 1941, directly or indirectly controlled by or affiliated with I. G. Farbenindustrie, A.G., or any other enemy of the United States or national of Germany or Japan, all as more fully set forth in the first count of the verified pleading attached hereto.

2. On and prior to February 16, 1942, plaintiff was the owner of approximately 93 per cent of the capital stock of General Aniline & Film Corporation, a Delaware corporation, and certain other property in the United States which stock and property were vested by defendants' predecessors upon the finding that such property was beneficially owned or controlled by I. G. Farbenindustrie, A.G., an enemy of the United States, and defendants now hold the property so vested and other property subsequently received as dividends on the stock of General Aniline & Film Corporation, all as more fully set out in the first count of the verified pleading attached hereto.

3. The present action was brought by plaintiff corporation pursuant to Section 9(a) of the Trading With the Enemy Act, as amended, and the Fifth Amendment to the Constitution of the United States, to compel a return of the stock of General Aniline & Film Corporation, property distributed to defendants' predecessors as dividends on such stock, and other property of plaintiff so vested.

4. Applicants will be bound by the judgment in this action and will be adversely affected by a distribution or other

disposition of property in the custody or subject to the control or disposition of the Court in this action, if such distribution or disposition is made without consideration of applicants' interest therein.

160 5. The interests of the applicants are not adequately represented by any of the present parties to this action for the reasons set forth in full in the verified proposed pleading attached hereto.

6. Applicants present this application for intervention and proposed verified complaint attached hereto on behalf of the corporation in a derivative capacity, on their own behalf, and on behalf of all other stockholders of plaintiff similarly situated, in the first and second counts of said pleading, and on their own behalf and on behalf of said stockholders without regard to whether the nature of the claim is derivative, representative or otherwise, in the third count of said pleading. The interests of plaintiff and of such other stockholders are not adequately represented in this action for the reasons set forth in full in said proposed pleading, and will not be unless applicants are permitted to intervene herein.

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161 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC.,
Plaintiff

v.

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REMINGTON RAND, INC.,
Intervenor

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all stockholders of plaintiff corporation similarly situated

802 West 190th Street
New York, New York
Intervenors

Civil Action
No. 4360-48

Amended Complaint in Intervention by Intervenors as Stockholders of Plaintiff Corporation to Assert a Claim of Plaintiff in a Derivative Capacity and to Prevent an Impending Settlement which Is Illegal under the Trading with the Enemy Act.

Intervenors above named, by leave of Court first had and obtained, file this, their complaint in intervention, for themselves and on behalf of all stockholders of plaintiff similarly situated, against the above named defendants, and say:

FIRST COUNT

1. The principal action and the action set forth in this complaint in intervention arise under the Fifth Amendment

to the Constitution of the United States and the Trading With the Enemy Act of October 6, 1916, as amended (U.S.C. Title 50, Appendix, Secs. 1-38).

2. Intervenors are residents of the City, County and State of New York and are now and have been at all times since December 6, 1941, non-enemies. The term "enemy" as used in this complaint means enemies, enemy nationals, allies of enemies, nationals of allies of enemies, nationals of a designated enemy country, or nationals of Germany or Japan, within the meaning of the Trading With the Enemy Act, as amended, and corporations or other persons directly or indirectly owned or controlled by or affiliated with an "enemy", and the term "non-enemy" means the absence of such status.

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3. Plaintiff is a corporation organized under the laws of the Confederation of Switzerland and has its principal office at Basle, Switzerland. Upon information and belief, plaintiff is and always has been a citizen of Switzerland, and has no principal office, place of business, or agent in the United States. Plaintiff is not now and has not been at any time since December 6, 1941, an enemy, at least to the extent that the plaintiff represents non-enemy interests, that is to say, at least to the extent plaintiff has been, since December 6, 1941, and is now owned by non-enemies.

4. On and prior to February 16, 1942, plaintiff was the owner of approximately 93 per cent of the capital stock of General Aniline & Film Corporation, a Delaware corporation, and of certain other property within the United States. On or about February 16, 1942, April 24, 1942, February 15, 1943, June 24, 1946, June 26, 1946, October 14, 1946 and February 16, 1948, defendants' predecessors issued certain vesting orders seizing the aforesaid property upon the finding that said property was beneficially owned or controlled by I. G. Farbenindustrie, A.G., an enemy of the United States. By reason of Executive Order No. 9788, effective October 15, 1946, predecessors of defendant McGrath received said stock and other property, including a substantial portion of the capital stock of plaintiff paid

as dividends on the stock of General Aniline & Film Corporation, and defendants now hold same, as more particularly alleged in the original complaint herein and as admitted in the answer of the defendants herein. The vested stock of General Aniline & Film Corporation has been valued, since the institution of the principal action, by plaintiff as in excess of $100,000,000, and by defendants variously as from $50,000,000 to in excess of $100,000,000.

5. Upon information and belief, plaintiff, within the time limited by law, filed claims with the Alien Property Custodian or predecessors of the defendant McGrath, or both, pursuant to the provisions of the Trading With the Enemy Act and after their denial filed the principal action
163 pursuant to Section 9(a) of the said Act and within the time limited by law. The theory of the complaint in the principal action is substantially identical with that advanced by the plaintiff in Uebersee Finanz-Korp. v. United States, 332 U.S. 480, and appears to have been patterned on that complaint. In essence, the complaint in the principal action alleges plaintiff is entitled to the return of all the property therein described because plaintiff at the time of vesting was a non-enemy entity. Although the complaint was filed October 21, 1948, the principal action is still not at issue. Defendants' amended answer (including counterclaims) was filed January 26, 1950, and plaintiff has not yet answered the counterclaims. While much time has been spent taking depositions, no pre-trial conference has yet been held concerning the issues of the principal action. Upon information and belief, the law of Switzerland would require plaintiff, upon receipt of any recovery of property or money in the principal action, by order of court, settlement or otherwise, to apply such recovery equally for the benefit of all its stockholders, without regard to their status as enemies or non-enemies and without regard to the policy of the United States as expressed in the Trading With the Enemy Act.

6. Intervenors herein allege on behalf of plaintiff that plaintiff is, under the Trading With the Enemy Act, entitled

to the return of that portion of the properties in issue herein, or of the proceeds of its sale at full and fair value, which is proportionate to the interests in plaintiff held by non-enemies, without regard to the disposition of any other portion of such properties, or the proceeds of any sale thereof, which defendants herein may be permitted to make under the provisions of the Trading With the Enemy Act or otherwise, such portion of the properties or the proceeds thereof to be returned to plaintiff for all proper corporate purposes, only excluding from the benefits thereof all interests ineligible to participate therein under the Trading With the Enemy Act.

7. Intervenors Kaufman, individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman, are, and at all times since December 6, 1941 and prior to the vesting orders referred to in paragraph 4 hereof have been, the sole and beneficial owners for value of eighty-six (86) shares of the
164 capital stock of plaintiff having a current market value of about $15,000 and having a substantially greater value if plaintiff's legal rights as herein stated are recognized. Upon information and belief, the non-enemy stockholders of plaintiff are, and at all times since December 6, 1941 and prior to the vesting orders referred to in paragraph 4 hereof have been, the sole and beneficial owners of not less than one-third of the outstanding stock of plaintiff, putting aside the stock presently in the hands of defendants herein, and formerly held by General Aniline & Film Corporation. The intervenors and other non-enemy stockholders of plaintiff are all eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the property involved in this proceeding.

8. Plaintiff has not made in the principal action the claim described in paragraph 6 above, and, on information and belief, plaintiff will not assert that or any similar claim in said action. On information and belief it is further alleged that in an effort to avoid the necessity of asserting

and pressing such claim, the ultimate determination of which may involve consideration of conflicting interests within plaintiff corporation, plaintiff proposes to settle the principal action on a lump-sum basis without regard to the merits of such claim and the conflicts within the corporation arising therefrom, all as more fully appears from the second count hereof.

9. Plaintiff, the intervenors and other non-enemy stockholders of plaintiff are not adequately represented by the management of plaintiff which controls and is conducting the principal action, because of the conflicting interests within plaintiff and the embarrassment of the present corporate management arising from the question whether it is enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. The assertion of the claim set forth in paragraph 6 involves the necessary consideration of excluding enemies from participation in the ultimate benefits of such claim. In view of the conflicting interests
165 within the plaintiff corporation, its management, which has a legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, is not qualified to raise and present issues which directly or indirectly result in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and belief, this Group has working control of the corporation and is responsible for the selection of its management. The United States Government, through the

Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". If the Sturzenegger Group should be held to be enemy or enemy-tainted, the claim referred to in paragraph 6 above would disqualify such Group from participating in the proceeds of the ultimate recovery. Intervenors therefore allege that it is contrary to the interests of the Sturzenegger Group and of the management of plaintiff, to the extent such management represents the Group, to draw any distinction between enemy and non-enemy interests
166 in plaintiff of the nature set forth in paragraph 6 hereof.

(c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 hereof, stating that the same was "manufactured" for expediency, and has otherwise indicated that plaintiff does not have any intention of pressing such claim and, on the basis of statements in the record here, appears determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of

the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record in the principal action that approximately 10.9 per cent of the plaintiff's stockholders were German nationals and therefore enemies at the time the properties involved were vested.

Intervenors and all other non-enemy stockholders of plaintiff are, will, or may be bound by the judgment in the principal action.

10. Intervenors are so situated as to be adversely affected by a distribution or other disposition of the properties involved in the principal action, which properties are subject to the control or disposition of this Court.

11. Intervenors assert the claim contained in this first count on behalf of plaintiff in a derivative capacity, and on behalf of all non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding.

167 12. The persons constituting the class of plaintiff's non-enemy stockholders eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding are so numerous as to make it impracticable to bring them all before this Court and the character of the right sought to be enforced for said class is common to all such persons.

13. Intervenors herein are now and were, at the time of the transaction of which they complain, shareholders of plaintiff. This claim in intervention is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The reasons intervenors have made no effort to secure from the managing directors or trustees of plaintiff such action as they desire are that such effort would be wholly futile and unavailing because the managing directors or trustees of plaintiff control and are conducting the principal action, because of the conflicting interests within the plaintiff, and because of the embarrassment of the managing directors or trustees of plaintiff arising from the question whether such managing directors or trustees are enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. The assertion of the claim set forth in paragraph 6 involves the necessary consideration of excluding enemies from participation in the ultimate benefits of such claim. In view of the conflicting interests within plaintiff corporation, its managing directors or trustees, which have a legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, are not qualified to raise and present issues which directly or indirectly result in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of the plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and belief, this Group has working control
168 of the corporation and is responsible for the selection of its management. The United States

Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G.Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". If the Sturzenegger Group should be held to be enemy or enemy-tainted, the claim referred to in paragraph 6 above would disqualify such Group from participating in the proceeds of the ultimate recovery. Intervenors therefore allege that it is contrary to the interests of the Sturzenegger Group and of the managing directors or trustees of plaintiff, to the extent such managing directors or trustees represent the Group, to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 hereof.

(c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 hereof, stating that the same was "manufactured" for expediency, and has otherwise indicated that the managing directors or trustees of plaintiff do not have any intention of pressing such claim and, on the basis of statements in the record here, appear determined to press a claim based solely on a complaint which under substan-

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tially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record in the principal action that approximately 10.9 per cent of plaintiff's stockholders were German nationals, and therefore enemies, at the time the properties involved were vested.

(d) As hereinafter more specifically shown in the second count, plaintiff and defendants have been negotiating for a settlement of the principal action since October, 1949, the fact of such negotiations appearing of record in the principal action for the first time in the latter part of 1949. Upon information and belief, plaintiff and defendants intend to conclude a settlement of the principal action at an early date and accordingly, since plaintiff corporation is a Swiss corporation, not otherwise amenable to the jurisdiction of the courts of the United States, the assertion of the claim urged in paragraph 6 of the first count may be completely destroyed by settlement of the principal action prior to the time your intervenors could comply with the necessary formalities of seeking to secure from the managing directors or trustees of plaintiff corporation such action as they desire, and obtaining a refusal thereof by such managing directors or trustees.

(e) The action these intervenors desire the plaintiff corporation to take to enforce rights which may properly be asserted by it is completely within the control of the managing directors or trustees of the corporation and action by the shareholders of plaintiff is unneces-

sary to authorize the managing directors or
170 trustees to take such action. In any case, any request for such action by the stockholders would, on information and belief, be wholly futile and unavailing because the Sturzenegger Group has working control of the stock of the plaintiff.

14. There is no effective remedy adequate to protect intervenors and other non-enemy stockholders of plaintiff similarly situated except intervention herein. Unless intervention is granted intervenors and other non-enemy stockholders of plaintiff similarly situated will be irreparably injured.

SECOND COUNT

1. Intervenors for their second count herein make all of paragraphs 1, 2, 3, 4, 5, 6 and 7 of their first count, by reference, a part of this second count as completely as though such paragraphs were set out at length herein.

2. During the latter portion of 1949, plaintiff and defendants actively sought to effect a negotiated settlement of the principal action. A principal obstacle to effecting any such settlement was the pendency of the claim of the intervenor, Remington Rand, Inc., which claimed an option to purchase from plaintiff a portion of the vested property for the sum of approximately $25,000,000. The fact of such negotiations for settlement first appeared on the record of the principal action when, late in 1949 and during the progress of such negotiations, defendants, supported by plaintiff, moved this Court for an order adjudging that defendants and plaintiff are entitled to settle the principal action regardless of any right to the contrary asserted by the intervenor, Remington Rand, Inc. This Court denied that motion, and an appeal is now pending thereon to the Court of Appeals for the District of Columbia. Upon information and belief, plaintiff and defendants propose to settle the main action at an early date.

3. Upon a trial of the issues involved in Remington Rand, Inc.'s complaint in intervention, a judgment adverse to that intervenor was entered on April 26, 1950. Remington Rand, Inc. has as yet taken no appeal from that adverse judgment. Accordingly, that intervention at this time poses no obstacle to the settlement of the principal action by plaintiff and defendants.

4. Upon information and belief, the settlement contemplates payment by defendants to plaintiff of an amount far below the full and fair value of the property involved
171 in the principal action and far below the full and fair value of plaintiff's claims in that action because the negotiations for settlement do not take into account the claim described in paragraph 6 of the first count hereof. Moreover, such settlement is contrary to the purpose and intent of the Trading With the Enemy Act in that, upon information and belief, it fails to impose upon plaintiff the duty and obligation of allocating the benefits of such settlement first to its non-enemy shareholders, to the extent of their full interest in plaintiff. Consequently, and contrary to the Trading With the Enemy Act, the proposed settlement will permit enemy shareholders of plaintiff to benefit therein at the expense of non-enemy shareholders, both allied and neutral, notwithstanding the fact that enemy stockholders are ineligible to benefit from the recovery of assets vested by the United States in an action filed under Section 9(a) of the Trading With the Enemy Act.

5. Any such settlement as is set out in paragraph 4 of this count would be in violation of the Trading With the Enemy Act which, with certain exceptions immaterial here, makes it unlawful for enemies to benefit by the return of property previously vested by the United States under that Act. This Court sitting in Equity has a duty and responsibility under Section 9(a) of the Trading With the Enemy Act to supervise and control the ultimate disposition of property recovered from the United States, either by way of settlement or of final judgment in any action instituted under Section

9(a) to make certain that the benefits of the property returned are limited to those who are eligible under the Trading With the Enemy Act to receive such benefits. By attempting to effect a cash settlement of plaintiff's claim, as set out in paragraph 4 of this count, on a basis which would permit the immediate transfer of the cash proceeds of such settlement beyond the territorial jurisdiction of United States courts, plaintiff and defendants would deprive this court of its power to supervise and control the ultimate disposition of the proceeds of the settlement in such a manner as will preclude the receipt of benefits therefrom by enemy shareholders of plaintiff at the expense of the neutral and allied non-enemy shareholders.

6. The withdrawal of the proceeds of any settlement beyond the territorial jurisdiction of the United States courts would compel intervenors and all other non-enemy
172 stockholders of plaintiff similarly situated to resort to the courts of Switzerland for relief. The Swiss Compensation Office, an agency of the Swiss Government, has heretofore determined that plaintiff and the Sturzenegger Group are free of enemy taint. For this reason and for the reason that a Swiss court is not the proper institution to effectuate the war and foreign policies of the United States Government, an appeal to a Swiss court to enforce the provisions of the Trading With the Enemy Act and to allocate the benefits of a settlement between plaintiff and defendants to deprive enemy stockholders of the benefits therefrom at the expense of neutral and allied non-enemy stockholders will be, upon information and belief, futile and ineffectual, resulting in a stultification of the purposes and policies of the Trading With the Enemy Act and indeed a perversion of such purposes and policies by permitting enemies to benefit at the expense of non-enemies. Accordingly, the intervenors and other non-enemy shareholders of plaintiff have no adequate remedy except by intervention herein to prevent a settlement between plaintiff and defendants which is illegal under the Trading With the Enemy Act.

7. Plaintiff, the intervenors, and other non-enemy stockholders are not adequately represented by the management of plaintiff which controls and is conducting the principal action and the settlement being negotiated therein, because of the conflicting interests within plaintiff and the embarrassment of the present corporate management arising from the question whether it is enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of the plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. For the reasons set out in paragraph 4 of this count, the proposed settlement involves the necessary consideration of excluding enemies from participation in the ultimate benefits of such a settlement. In view of the conflicting interests within plaintiff corporation, its management, which has a legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, is not qualified to negotiate a settlement which di-
173 rectly or indirectly results in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and belief, this Group has working control of the corporation and is responsible for the selection of its management. The United States Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group

"owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". Intervenors therefore allege that since it is the possible enemy status or enemy-taint of the Sturzenegger Group which in largest measure impels plaintiff corporation to effect a compromise of its claim, it is contrary to the interests of the Sturzenegger Group and the management of plaintiff corporation, to the extent such management represents the Group, to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 of the first count hereof for the purpose of the settlement.

174 (c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 of the first count hereof, stating that the same was "manufactured" for expediency, and has otherwise indicated that the management of plaintiff does not have any intention of pressing such claim and, on the basis of statements in the record here, appears determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally

of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record that approximately 10.9 per cent of the plaintiff's stockholders were German nationals, and therefore enemies, at the time the properties involved were vested.

(d) The management of plaintiff which controls and is conducting the principal action and which is negotiating the proposed settlement which is illegal under the Trading With the Enemy Act proposes, upon information and belief, to remove the proceeds of such settlement to Switzerland, beyond the jurisdiction of this Court.

Intervenors and all other non-enemy stockholders of plaintiff corporation are, will, or may be bound by the judgment in the principal action.

8. Intervenors are so situated as to be adversely affected by a distribution or other disposition of the properties involved in the principal action, which propertes are subject to the control of disposition of this Court, or by a distribution of the proceeds of such a settlement as described in this count, without supervision of this Court.

175 9. Intervenors assert the claim contained in this second count on behalf of plaintiff in a derivative capacity, and on behalf of all non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding.

10. The persons constituting the class of non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding are so numerous as to make it impracticable to bring them all

before this Court and the character of the right sought to be enforced for said class is common to all such persons.

11. Intervenors herein are now and were, at the time of the transaction of which they complain, shareholders of plaintiff. This claim in intervention is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The reasons intervenors have made no effort to secure from the managing directors or trustees of plaintiff such action as they desire are that such effort would be wholly futile and unavailing because the managing directors or trustees of plaintiff control and are conducting the principal action, because of the conflicting interests within the plaintiff, and because of the embarassment of the managing directors or trustees of plaintiff arising from the question whether such managing directors or trustees are enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. For the reasons set forth in paragraph 4 of this count, the proposed settlement involves the necessary consideration of excluding enemies from participation in the ultimate benefits of such a settlement. In view of the conflicting interests within plaintiff corporation, its managing directors or trustees, which have a
176 legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, are not qualified to negotiate a settlement which directly or indirectly results in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred

to as the Sturzenegger Group. Upon information and belief, this Group has working control of the corporation and is responsible for the selection of its management. The United States Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". Intervenors therefore allege that since it is the possible enemy status or enemy-taint of the Sturzenegger Group which in largest measure impels plaintiff corporation to effect a compromise of its claim, it is contrary to the interests of the Sturzenegger Group and of the managing directors or trustees of plaintiff, to the extent such managing directors or trustees represent the Group, to draw any distinction between enemy and non-enemy interests in plaintiff
177 of the nature set forth in paragraph 6 of the first count hereof for the purpose of the settlement.

(c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 of the first count hereof, stating that the same was "manufactured" for expediency,

and has otherwise indicated that the managing directors or trustees of plaintiff do not have any intention of pressing such claim and, on the basis of statements in the record here, appear determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record that approximately 10.9 per cent of the plaintiff's stockholders were German nationals, and therefore enemies, at the time the properties involved were vested.

(d) As in this count shown, plaintiff and defendants have been negotiating for a settlement of the principal action since October 1949, the fact of such negotiations appearing of record in the principal action for the first time in the latter part of 1949. Upon information and belief, plaintiff and defendants intend to conclude a settlement of the principal action at an early date, and accordingly, since plaintiff is a Swiss corporation not otherwise amenable to the jurisdiction of the courts of the United States, the assertion of the claim urged in paragraph 6 of the first count may be completely destroyed by settlement of the principal action prior to the time your intervenors could comply with the
178 necessary formalities of seeking to secure from the managing directors or trustees of plaintiff corporation such action as they desire, and obtaining a refusal thereof by such managing directors or trustees.

(e) The action these intervenors desire the plaintiff corporation to take to enforce rights which may properly be asserted by it is completely within the control of the managing directors or trustees of the corporation and action by the shareholders of plaintiff is unnecessary to authorize the managing directors or trustees to take such action. In any case, any request for such action by the stockholders would, on information and belief, be wholly futile and unavailing because the Sturzenegger Group has working control of the stock of the plaintiff.

THIRD COUNT

1. Intervenors for their third count herein make all of paragraphs 1, 2, 3, 4, 5, 6 and 7 of their first count and paragraphs 2, 3, 4, 5 and 6 of their second count, by reference, a part of this third count as completely as though such paragraphs were set out at length herein.

2. Intervenors and other non-enemy stockholders similarly situated are not adequately represented by the management of plaintiff which controls and is conducting the principal action and the settlement being negotiated therein, because that management is negotiating a settlement which is illegal under the Trading With the Enemy Act and upon information and belief proposes to remove the proceeds of such settlement to Switzerland, beyond the jurisdiction of this Court. Intervenors and all other non-enemy stockholders of plaintiff are, will, or may be bound by the judgment in or settlement of the principal action.

3. Intervenors are so situated as to be adversely affected by a distribution or other disposition of the properties involved in the principal action, which properties are subject to the control or disposition of this Court, or by a distribution of the proceeds of such a settlement as described in this count, without supervision of this Court.

4. Intervenors assert the claim contained in this third count, on behalf of themselves and other non-enemy share-

holders of plaintiff similarly situated, without regard to whether it may be categorized as representative, derivative, or otherwise.

179 5. The persons constituting the class of non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding are so numerous as to make it impracticable to bring them all before this Court and the character of the right sought to be enforced for said class is common to all such persons.

WHEREFORE, these intervenors demand:

1. That this Court adjudicate and determine the rights of plaintiff to be as set forth in paragraph 6 of the first count of this complaint in intervention.

2. That this Court restrain and enjoin plaintiff and defendants from making any settlement of the principal action unless and until adequate provision is made for adjudication and determination by this Court of the claim as set forth in said paragraph 6.

3. That this Court order and direct plaintiff and defendants to pay the amount of any settlement which may be made into the registry of this Court pending presentation of a plan by the parties hereto whereby the amount of such settlement shall be applied first to the benefit of plaintiff's non-enemy shareholders, to the extent of their full interest in plaintiff, and pending ultimate determination as to the rights of those eligible to participate in the proceeds under the Trading With the Enemy Act.

4. That this Court retain control over all the properties involved or the proceeds of the sale thereof until plaintiff has given adequate assurance or security that such properties or proceeds will be handled by the corporation in strict accordance with the provisions of the Trading With the Enemy Act and such orders or directions as the Court may issue to enforce that enactment.

179 5. Such other and further relief as this Court may deem proper.

WILLIAM RADNER
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Washington 5, D. C.

ODELL KOMINERS
Tower Building
Washington 5, D. C.

HENRY G. FISCHER
Dupont Circle Building
Washington 6, D. C.

Attorneys for Intervenors

GRAUBARD AND MOSKOVITZ
115 Broadway
New York 6, New York
Of counsel

181 State of New York }
County of New York } *ss:*

AENNI C. KAUFMAN, being duly sworn, deposes and says that she resides at 802 West 190th Street, New York 33, New York, and that she is one of the intervenors in the foregoing complaint and knows the contents thereof and that the same are true of her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

AENNI C. KAUFMAN

Subscribed and sworn to before me, a Notary Public in and for the State and County of New York this 3rd day of June, 1950.

JESSE F. TOMPKINS,
Notary Public

182 Filed June 13, 1950

Affidavit

CITY OF ZURICH,
CANTON OF ZURICH,
CONFEDERATION OF SWITZERLAND } *ss:*

Hans Gut, being duly sworn, deposes and says:

I am a Director of Schoop, Reiff & Co. Aktiengesellschaft, a Swiss banking corporation, with offices at Pelikanstrasse 6, Zurich. I am authorized to make this affidavit on behalf of Schoop, Reiff & Co. Aktiengesellschaft in my capacity as Director of and also because I am in full charge of all matters pertaining to Interhandel A.G. and to the functions of Schoop, Reiff & Co. as protective committee for the *bona fide* non-enemy ordinary shareholders of Interhandel A.G.

I have, on behalf of certain clients of Schoop, Reiff & Co. Aktiengesellschaft, who have been and are *bona fide* non-enemy shareholders of Interhandel A.G., followed the progress of the litigation pending in the District of Columbia and it was decided between my clients and my company that it is necessary to organize a committee in order to protect the interests of the non-enemy ordinary shareholders of Interhandel A.G.. Accordingly Schoop, Reiff & Co. Aktiengesellschaft of which I am a Director consented to act as such protective committee. On May 16th, 1950, we caused an advertisement of that fact to be printed in several of the leading newspapers in Switzerland and invited interested parties to contact my company, Schoop, Reiff & Co. Aktiengesellschaft—as such protective committee—and to all interested persons we gave an Exposé dated May 16th, 1950, which we prepared, together with a form of authorization in which those shareholders who are willing, consented in writing that Schoop, Reiff & Co. shall act as protective committee on their behalf. The purpose of the committee was to obtain information concerning the progress of the litigation and of the reported negotiations for settlement on terms unknown to us, and the handling of corporate affairs, by the management of Interhandel A. G.; to make, if necessary, an intervention in the litigation presently pend-

183 ing in the District of Columbia and in general to preserve and protect the rights of *bona fide* non-enemy shareholders of Interhandel A. G. and also to see to it that if a settlement is made of the litigation in Washington, it should be made a fair and proper price with due regard for the interests of such *bona fide* non-enemy ordinary shareholders of Interhandel A. G..

In the original advertisement we fixed the date for signing of the authorizations as of May 31st. On June 2nd we caused a further advertisement to appear in the leading newspapers of Switzerland extending the time within which to file authorizations with Schoop, Reiff & Co. as protective committee until June 15th, 1950.

As of the close of business on June 8th, 1950, 94 persons owning 11'196 ordinary shares of Interhandel A.G. have executed a form of authorization authorizing and empowering Schoop, Reiff & Co. Aktiengesellschaft to act as protective committee for them, being *bona fide* non-enemy shareholders of Interhandel A.G., according to the terms there indicated; Schoop, Reiff & Co. itself owns twenty five shares of Interhandel A. G.. Each of the shareholders who has authorized the committee to act for him has already paid or has pledged himself to pay to Schoop, Reiff & Co. as protective committee the sum of ten Swiss francs per share to cover expenses of the committee and any counsel which it may appoint to represent it in accordance with its purposes.

I have received and read the papers pertaining to the motion for leave to intervene made by Erich G. Kaufmann and Aenni C. Kaufmann together with the proposed amended complaint which are entitled:

"Consolidated motion for rehearing and to alter or amend judgment denying motion for leave to intervene"

and

"Amended motion for leave to intervene"

and

"Amended complaint in intervention by intervenors as stockholders of plaintiff corporation to assert a claim of plaintiff in a derivative capacity and to prevent an impend-

ing settlement which is illegal under the Trading With the Enemy Act."

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and on behalf of myself and Schoop, Reiff & Co. Aktiengesellschaft as protective committee, hereby state and confirm that I am in agreement therewith and support the claims made therein and intend formally to become party to said intervention or to intervene independently in such manner as is deemed appropriate, at the earliest opportunity.

The interests of the *bona fide* non-enemy shareholders represented by Schoop, Reiff & Co. Aktiengesellschaft, as protective committee, are most substantial constituting as of the close of business on June 8th, 1950 a total of 11'196 shares which at the present market value quoted on the stock exchanges in Switzerland of 695 Swiss francs per share have a total value of 8.781.220 Swiss francs or approximately $1.805.400, and in my opinion and in the opinion of the protective committee, have a value of at least four times that amount if due recognition be given to their interests as non-enemy shareholders, in the vested assets in the United States.

HANS GUT.

Confederation of Switzerland
Canton and City of Zurich
Consulate General of the United States of America } *ss:*

Subscribed and sworn to before me,
ELEANOR R. BORROWDALE,
....., Vice Consul of the United States of America in and for the District of Zurich, duly commissioned and qualified, this 9th day of June, 1950.

ORIGINAL
Service No. 1632
Fee $2.00
Frs. 8.80

ELEANOR R. BORROWDALE,
Vice Consul of the United States of America at Zurich, Switzerland.

185 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS ET COMMERCIALES S.A., ETC. (I.G. CHEMIE),

Plaintiff,

v.

J. HOWARD MCGRATH, ET AL.,

Defendants,

REMINGTON RAND INC.,

Intervenor Plaintiff.

Civil Action No. 4360-48.

Filed July 7, 1950

Stipulation Further Extending Time for Plaintiff to Reply to Second, Third, Fourth and Fifth Counterclaims.

It is hereby stipulated this 3rd day of July, 1950, that the plaintiff may have to and including August 1, 1950 within which to reply to the second, third, fourth and fifth counterclaims of the defendants.

JOHN J. WILSON,
Attorney for Plaintiff.

HAROLD I. BAYNTON,
Attorney for Defendants.

Approved this 7th day of July, 1950.

H. W. NEWENHAUT,
Judge.

186 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC. (I. G. CHEMIE),

Plaintiff,

v.

J. HOWARD MCGRATH, ET AL.,

Defendants;

REMINGTON RAND, INC.,

Intervenor,

ERIC C. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all stockholders of plaintiff similarly situated,

Applicants for Intervention.

Civil Action No. 4360-48

Filed June 30, 1950

Order

Upon consideration of the motion of applicants Kaufman for a rehearing of their motion for leave to intervene, upon consideration of the motion to alter or amend the judgment entered May 26, 1950 so as to grant applicants leave to file the amended motion for leave to intervene, to which is attached as an exhibit a copy of a proposed amended com-

plaint, and further upon consideration of applicants' amended motion for leave to intervene, and after hearing the parties and upon all the papers filed on the original motion and filed herein, it is hereby

ORDERED:

1) That the motion for a rehearing is granted.

2) That applicants' motion to alter or amend the judgment entered May 26, 1950 so as to grant leave to file the amended motion for leave to intervene is granted.

3) The amended motion for leave to intervene is
187 deemed filed on June 5, 1950.

4) The amended motion for leave to intervene is denied.

Dated: June 30th, 1950.

EDWARD A. TAMM
Judge

SEEN:

JOHN J. WILSON
Counsel for Plaintiff

ODELL KOMINERS
Counsel for Applicants for Intervention

HAROLD I. BAYNTON
Counsel for Defendants

Excerpt From Transcript of Hearing Wednesday, June 14, 1950.

THE COURT: I have read them.

47 Fundamentally, there are two motions before the Court at the present time, one entitled "Consolidated motion for rehearing and to alter or amend judgment denying motion for leave to intervene," and, second, a motion to file an amended complaint which, in turn, asks for leave to intervene.

The Court has previously granted the first motion in so far as rehearing is concerned by the proceedings this morning. In reaching its decision on these motions the Court has given consideration to all of the elements, all of the points made by counsel for the plaintiff, for the defendant, and for the interveners, and if the Court omits in its enumeration any of the elements which counsel has
48 argued or statements in those points and authorities the omission is one of enumeration and not of consideration.

The Court has considered the probability of the applicability of the statute of limitations; it has considered the status and legal significance in this action presently being maintained by these petitioners; it has considered the provisions of the Trading With the Enemy Act as to who may sue in cases of this kind. I add, parenthetically, that there is a fine legal point raised as to whether these petitioners may bring an action in behalf of all non-alien stockholders in the light of the restrictions upon the right to bring an action within the provisions of the Trading With the Enemy Act, pointing out again that apparently that has not been adjudicated. The Court must consider further the Hornbook principle that a stockholder has no vested right in the property, in the particular property of a corporation. The Court must consider in this case that there is basically no allegation of fraudulent conduct alleged by the petitioners against these plaintiffs or defendants, only the charge that the settlement is not to the best interest of the petitioners. The Court considers the fact that the petitioners by their motion to intervene seek to obtain for themselves at least, and possibly for other non-alien stockholders, a preferential status in obtaining property of the corporation. The Court has considered the prob-
49 ability that the petitioners' action is not basically for the benefit of all of the stockholders, or perhaps for even a majority of the stockholders of the plaintiff corporation. The Court has considered the position of the plaintiff and the defendants in the principal action that

the sole right to recover involved under Trading With the Enemy Act is possibly in the plaintiff corporation.

The Court has considered carefully the provision of Rule 23 of the Federal Rules of Civil Procedure with reference to class actions. I have considered the provision of Rule 24 of the Civil Rules with reference to intervention, particularly Rule 24 (a), sub-section 3, upon which counsel for the petitioners has placed considerable emphasis, and various other factors that have been argued in the course of the presentations of these motions, and the predecessor motion which was the initial motion for leave on the part of these petitioners to intervene.

The Court believes that the petitioners have not established grounds justifying the Court to permit the motion to intervene, and the Court reaches its decision with the full knowledge that the trend of opinion is to permit persons who can show some color of right to proceed by intervention, but the Court cannot construe this as permitting every lawsuit to become virtually a free-for-all in which every person has some right to get into the action, without casting any reflection upon the motives of these petitioners, upon the theory "If we win, fine; if we don't get anything we have lost nothing."

The Court believes the rule relating to class actions should be strictly construed, even to those cases in which the petitioners for intervention can establish clearly to the satisfaction of the Court that they have a legal right to participate in the proceeding then pending.

Under the circumstances the Court must deny the petitioners' motion to alter and amend. The Court has granted the petitioners the right to file their amended complaint and denies their motion for leave to intervene.

188 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC. (I. G. CHEMIE), *Plaintiff*,

v.

J. HOWARD MCGRATH, ET AL., *Defendants*,

REMINGTON RAND, INC., *Intervenor*,

ERIC G. KAUFMAN and AENNI C. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all stockholders of plaintiff similarly situated, *Applicants for Intervention*.

Civil Action No. 4360-48

Filed, July 11, 1950

Notice of Appeal

Notice is hereby given this 11th day of July, 1950, that Eric G. Kaufman and Aenni C. Kaufman, applicants for intervention in the above entitled action, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered

on the 30th day of June, 1950, denying applicants' amended motion for leave to intervene.

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Washington 5, D. C.

HENRY G. FISCHER
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Attorneys for Applicants for Intervention.

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Plaintiff

HAROLD I. BAYNTON, ESQ.
DAVID SCHWARTZ, ESQ.
Dept. of Justice
Defendants

J. EDWARD BURROUGHS, JR.
1625 K St. N.W.
Intervenor

GRAUBARD AND MOSKOVITZ
115 Broadway
New York 6, New York
Of Counsel

[fol. 79] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10755

ERIC G. KAUFMAN and AENNI C. KAUFMAN, Appellants,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian,

GEORGIA NEESE CLARK, Treasurer of the United States, and RMEINGTON RAND, INC., Appellees

Appeal from the United States District Court for the District of Columbia.

OPINION

Argued January 17, 1951. Decided April 5, 1951

Mr. William Radner, with whom *Messrs. Odell Kominers* and *Henry G. Fischer* were on the brief, for appellants.

Mr. John J. Wilson, with whom *Messrs. Roger J. Whitford, Philip S. Peyser*, and *Jo V. Morgan, Jr.*, were on the brief, for appellee Societe Internationale pour Participations Industrielles et Commerciales S. A., etc.

Mr. David Schwartz, Attorney, Department of Justice, with whom *Assistant Attorney General Harold I. Baynton* and *Messrs. George B. Searls* and *Sidney B. Jacoby*, Attorneys, Department of Justice, were on the brief, for appellees *J. Howard McGrath*, Attorney General of the United States, and *Georgia Neese Clark*, Treasurer of the United States.

Messrs. William P. MacCracken, Jr., Homer Cummings, J. Edward Burroughs, Jr., and Frank C. Sterck were on the brief for appellee Remington Rand, Inc.

Before Edgerton, Proctor, and Fahy, Circuit Judges

EDGERTON, Circuit Judge:

Societe Internationale (Interhandel) sued to recover property vested under the Trading with the Enemy

Act, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.* "Any person not an enemy or ally of enemy claiming any interest . . . in any money or other property which may have been conveyed . . . to the Alien Property [fol. 80] Custodian or seized by him hereunder and held by him or by the Treasurer of the United States" may "institute a suit in equity . . . to establish the interest . . . so claimed . . ." 50 U. S. C. App. § 9(a). Interhandel contends it owned the property, is a Swiss corporation, and is not an enemy or ally of enemy. The government contends Interhandel is enemy-owned and enemy-controlled.

Appellants are American citizens who own a few shares of stock in Interhandel. They undertook to intervene in its suit and appeal from an order denying intervention. They do not deny that much of Interhandel's stock is enemy-owned. But they contend that Interhandel has a claim, for the benefit of those of its stockholders who are not enemies, to the return of a share of the vested property proportionate to the interest of these stockholders in the corporation. They contend they are entitled to intervene to compel the corporation to assert this claim.

Rule 24(a) of the Federal Rules of Civil Procedure provides that anyone may intervene in an action ". . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court . . ." Clause (2) is inapplicable. Appellants will not "be bound by a judgment in the action" unless they are allowed to intervene. If they have a right to a share of the vested property they cannot be deprived of it in a suit to which they are not parties. Clause (3) is also inapplicable. "The law is well settled that one entitled to intervene as a matter of right under Rule 24(a)(3)FRCP 'must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment.' *Pure Oil Co.* v. *Ross*, 170 F. (2d) 651 (CCA 7, 1948)." *Dowdy* v. *Hawfield*. U. S. App. D. C. , F. 2d ; No. 10475, decided March 1, 1951. "Clause (3) contemplates that the person having the right of inter-

vention should have a legal interest in the property in the custody of the court."[1] Appellants have no such interest. "The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members. *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273." *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24. If this basic principle were disregarded in connection with clause (3) the result would be that any stockholder in any corporation could insist on intervening in any suit involving a claim of the corporation to specific property. Moreover, a corporation has "no 'standing vicariously' to assert the interest of its shareholders." *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474.

Appellants have filed a suit in the United States District Court for the Southern District of New York to recover a proportionate share of the vested property. We express no opinion regarding that suit. We hold only that appellants have no valid claim to intervene in the corporation's suit.

Affirmed.

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[1] *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116 (D. C., D. Dela., 1939). *Cf. Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4, 1933); *Cross* v. *Missouri & A. Ry. Co.*, 74 F. Supp. 242 (D. C., W. D. Ark., 1947); *In re Bender Body Co.*, 6 FRS 379 (D. C., N. D. Ohio, 1942).

[fol. 81] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1951

No. 10,755

ERIC G. KAUFMAN, et al., Appellants,

vs.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc., et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Proctor and Fahy, Circuit Judges

JUDGMENT—Filed April 5, 1951

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court denying appellants' amended motion for leave to intervene in this cause be, and the same is hereby, affirmed, with costs of appellees Societe Internationale pour Participations Industrielles et Commerciales S. A., etc., and Remington Rand, Inc., to be borne by appellants.

Per Circuit Judge Edgerton.

Dated April 5, 1951.

[fol. 82] [Designation of Record omitted in printing.]

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1950

[Title omitted]

COUNTER-DESIGNATION OF RECORD—Filed June 2, 1951

The Clerk will please include in the certified transcript of record for use by the Appellants on petition to the Supreme Court of the United States for writ of certiorari in the above entitled cause, the following documents:

1. Copy of Appellants' New York complaint, reproduced at pages 31-34 of the appendix of this Appellee's brief.

John J. Wilson, 815 15th Street, N. W., Washington, D. C., Attorney for Appellee Societe Internationale, etc.

[fol. 84] [Certificate of Service omitted in printing.]

[fol. 85] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION No. 56-246

ARNNI C. KAUFMAN and ERIC G. KAUFMAN, individually and as general guardians of the persons and property of EMIL GERT KAUFMAN and RUTH MIRJAM KAUFMAN, Plaintiffs,

against

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

To the Judges of the United States District Court, for the Southern District of New York:

Plaintiffs, complaining of the defendant herein, allege:

1. Plaintiffs are citizens of the United States and residents of the City, County and State of New York, and this

action arises under, and plaintiffs bring this action pursuant to, the provisions of Section 9 of the "Trading With the Enemy Act", 40 Stat. 411, 419, as amended, 50 U. S. C. App., Section 99.

2. Defendant, J. Howard McGrath, is a citizen of the United States and is the duly appointed and qualified Attorney General of the United States of America.

[fol. 86] 3. Plaintiffs are, and have been at all times since prior to December 7, 1941, and prior to the Vesting Orders referred to in Paragraph 4 hereof, the sole and beneficial owners for value, of eighty-six (86) shares of the capital stock of Internationale Gesellschaft Fur Chemische Unternehmungen, A. G., a corporation organized and existing under the laws of Switzerland, commonly known as, and hereinafter called, "I. G. Chemie". Upon information and belief, the name of said corporation has been changed to Internationale Industrie & Handelsbeteiligungen, A. G., also known as "Interhandel, A. G."

4. On February 16, 1942, the Secretary of the Treasury vested a substantial majority of the capital stock of General Aniline and Film Corporation, the owner of which stock was I. G. Chemie. Thereafter the Alien Property Custodian on April 29, 1942, by Vesting Order No. 5, vested again *inter alia*, this same stock, upon a finding that the real owner of the stock was I. G. Farbenindustrie, A. G., a German corporation. By several successive Vesting Orders the Alien Property Custodian similarly vested certain other assets of I. G. Chemie upon substantially the same finding. The defendant has duly succeeded to the functions, powers and duties of the Alien Property Custodian and the aforesaid assets are now vested in the defendant.

5. Upon information and belief, I. G. Chemie has filed claims with the Alien Property Custodian or the defendant, or both, pursuant to the provisions of the "Trading With the Enemy Act", as amended, and an action has been brought by I. G. Chemie pursuant to Section 9 of said Act, which is now pending in the United States District Court for the District of Columbia against defendant.

6. Pursuant to the order of the Secretary of the Treasury dated February 16, 1942, plaintiffs on March 28, 1942, filed a claim with the Secretary of the Treasury for the return of their interest in the vested property. No affirma-

[fol. 87] tive action was taken thereon to the knowledge of plaintiffs. On or before November 16, 1943, plaintiffs filed with the Alien Property Custodian a notice of claim for the aforesaid property and funds, or their interest therein; at the request of defendant, plaintiffs on or before June 15, 1948, refiled said claim with defendant; on or about October 12, 1949, the Hearing Examiner of the Office of Alien Property of defendant denied the aforementioned claims.

7. Plaintiffs herein duly applied for review of said action of the Hearing Examiner and an order dated December 15, 1949, denying said petition for review was served upon plaintiffs by letter dated December 16, 1949.

8. Plaintiffs have exhausted their administrative remedies.

9. Plaintiffs are not now and have not been at any time since prior to December 7, 1941, enemies, enemy nationals, allies of enemies or nationals of allies of enemies, or nationals of Germany or Japan, within the meaning of the "Trading With the Enemy Act."

10. Plaintiffs, as shareholders of I. G. Chemie, later known as Interhandel, A. G., are entitled to their full proportionate share of the property vested in the defendant as aforesaid, or to the proceeds of any sale thereof for fair and full value by defendant, notwithstanding that Interhandel, A. G., by reason of alleged enemy interest or otherwise, may fail to obtain the return of said vested property or may effect a settlement with defendant for some amount less than the fair and true value of the aforesaid vested property.

11. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray:

(1) That a summons be issued out of this Court directed to said J. Howard McGrath, Attorney General of the United States, demanding him on a day certain to appear [fol. 88] and answer to this bill of complaint and obey and perform said orders and decrees as to the Court may seem proper.

(2) That a decree be entered adjudging that, as between plaintiffs and defendant, plaintiffs are entitled to the ownership, possession and enjoyment of their proportionate

share of the property and funds seized by the Alien Property Custodian as hereinbefore alleged.

(3) That a decree be made directing said defendant to pay, convey, transfer, assign and deliver to plaintiffs the aforesaid proportionate share.

(4) That this Court grant such other, further and different relief as to the Court may seem equitable, just and proper.

Graubard & Moskovitz, by (S.) Seymour Graubard, a Member of the Firm, Attorneys for Plaintiffs, Office and P. O. Address: 115 Broadway, New York 6, N. Y.

Dated: March 9th, 1950.

[fols. 89-90] Clerk's Certificate to foregoing transcript omitted in printing.

Clerk's Certificate to foregoing supplemental transcript omitted in printing.

[fol. 91] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

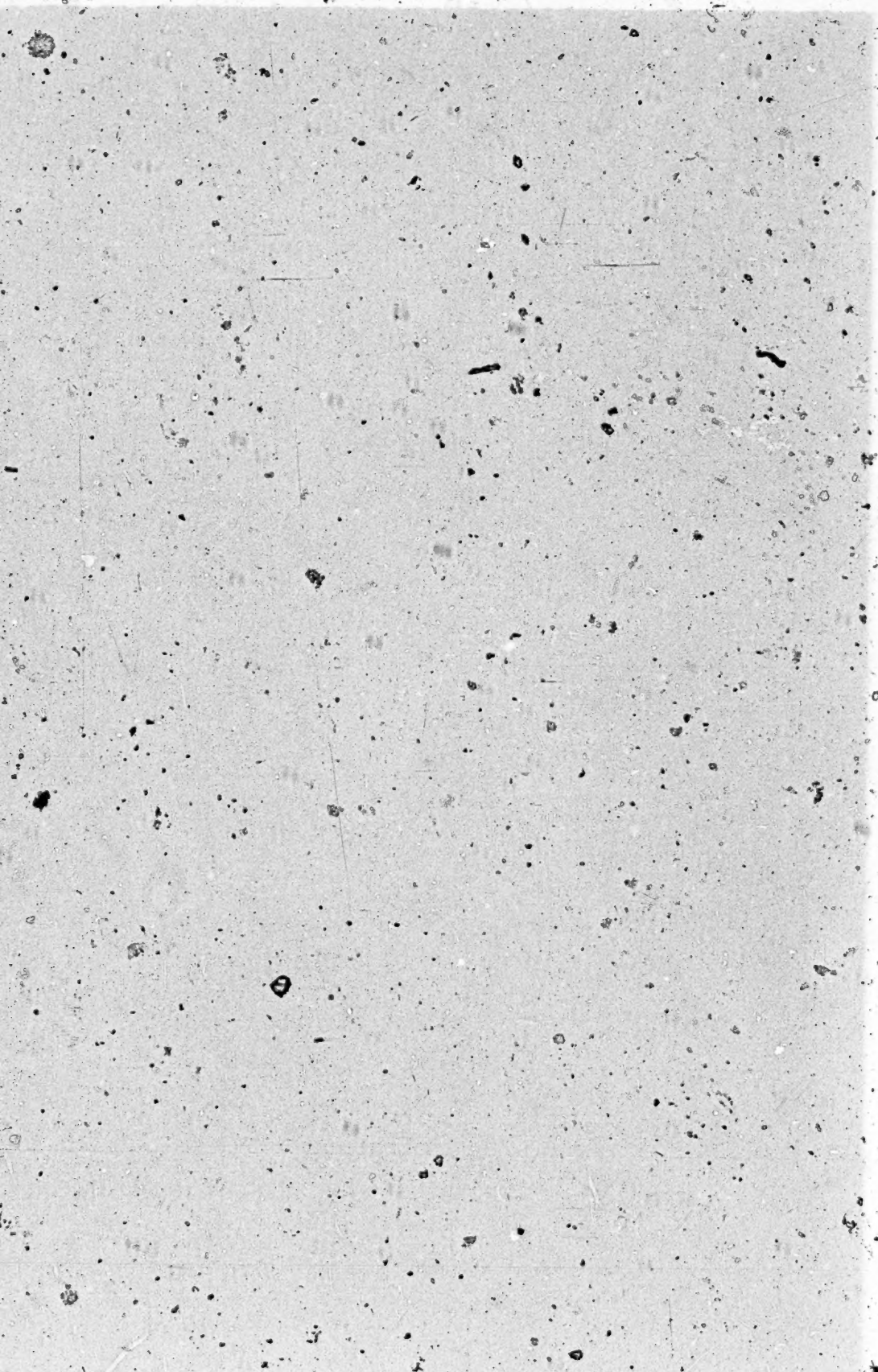
[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.



Office Supreme Court, U. S.
FILED
JUL 3 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 172

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian,

GEORGIA NEESE CLARK, Treasurer of the United States, and

REMINGTON RAND, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

WILLIAM RADNER,
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New York, New York,
Of Counsel.

July 3, 1951.

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IN THE

Supreme Court of the United States

No.

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Eric G. Kaufman and Aenni C. Kaufman, your petitioners, as non-enemy stockholders of Societe Internationale pour Participations Industrielles et Commerciales S. A., a Swiss corporation,[1] on their own behalf and on behalf of all other non-enemy stockholders of the corpora-

[1] Hereinafter variously referred to as "I. G. Chemie," "the corporation", or "plaintiff."

tion similarly situated,[2] pray that a writ of certiorari be issued to revew the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled action on April 5, 1951, denying petitioners' amended motion under Rules 24(a)(2) and 24(a)(3) F.R.C.P. for leave to intervene and to file an amended complaint in intervention.

OPINIONS BELOW.

The oral opinion of the District Court (R. 74) is unreported. The opinion of the Court of Appeals (R. 79) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on April 5, 1951 (R. 81). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

This petition presents for decision for the first time in this Court, and in a case of fundamental importance, the issues anticipated and posed by this Court in *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 489 (1947), as awaiting "legislative or judicial clarification."

A Swiss corporation, whose American assets have been vested by the Alien Property Custodian, has some enemy shareholders. The Government further claims that the corporation is enemy controlled or tainted by reason of its management shareholders. The issue basic to this petition is: "what part of such friendly alien corporation's property may be retained"[3] by the Government, where the

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[2] Non-enemy shareholders of the corporation owning over 11,000 ordinary or common shares out of a total of approximately 140,000 outstanding have formally supported petitioners in this proceeding (R. 69).

[3] The issue as posed in the *Uebersee* case is quoted in full at page 6, *infra*.

shareholdings of non-enemies amount to more than one-third of the outstanding voting stock of the corporation and represent more than 50 percent of the invested capital of the corporation?

This basic issue is presented in three separate but related questions in this case, as follows:

Do American and other non-enemy stockholders of a Swiss corporation have a right to intervene as a class in an action brought by that corporation under Section 9(a) of the Trading With the Enemy Act to recover property vested by the Alien Property Custodian—

(1) where the management of the corporation, because of financial self-interest, violates its fiduciary obligation to the corporation and its stockholders by deliberately refusing to assert a claim, even in the alternative, for the return of the proportionate non-enemy interest in the vested property, although such claim has been specifically reserved by this Court in the *Uebersee* case for future decision, and the corporate management by its refusal may cause substantial loss to such American and other non-enemy stockholders?

(2) where the management of the corporation and the Alien Property Custodian have affirmatively stated their intention to settle the corporate suit, and have not denied petitioners' allegations that such settlement (a) will be made for an amount far less than the vested assets proportionate to the non-enemy interests in the corporation and thus inadequate, and (b) will accrue to all stockholders alike, thus ultimately benefitting enemy stockholders at the expense of non-enemy stockholders, contrary to the purpose and provisions of the Trading With the Enemy Act?

(3) where the vested property is presently a fund subject to the control of the court, and disposition of the property will adversely affect the American and

other non-enemy stockholders unless their interests are adequately represented in the proceeding?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, at pages 19 to 26.

STATEMENT.

The plaintiff, I. G. Chemie, is a Swiss holding corporation, the American assets of which consist principally of almost all of the outstanding stock of General Aniline & Film Corporation, its American subsidiary. Between 1942 and 1946, the Alien Property Custodian vested these assets, valued at from $50,000,000 to $100,000,000 (R. 48-49).

I. G. Chemie on October 21, 1948, brought the principal proceeding under Section 9(a) of the Trading With the Enemy Act in the United States District Court for the District of Columbia, for return of the vested property. Its complaint is very similar to that sustained by this Court in the *Uebersee* case in 1947, and alleges substantially that it was and is non-enemy (R. 1-15).[4] The Government answered in effect that I. G. Chemie was enemy and enemy tainted because those stockholders in control of the management—known as the "Sturzenegger Group" —were part of a conspiracy to "cloak" the ownership and domination by I. G. Farben of properties in many countries of the world, including the United States, and therefore the corporation was not entitled to the return of any of the vested property (R. 28-30).

In this action it appears on the record that the "Sturzenegger Group" owned or controlled, in all, about 39 percent of the voting stock of the corporation (R. 51). It is

[4] The term "non-enemy" is used herein for the sake of brevity to mean not an enemy, enemy national, an ally of an enemy, a national of an ally of enemies, a national of a designated enemy country, or a national of Germany or Japan, within the meaning of the Trading With the Enemy Act, as amended.

further claimed of record in this action that approximately an additional 11 percent of the corporation's voting stock was owned at the time of vesting by nationals of Germany (R. 51), and that more than 33 percent of the voting stock was owned by American, Swiss, and other non-enemy stockholders (R. 50).

Although the Government alleges that the corporation was enemy tainted and therefore not entitled to a return of any of its vested property, the corporation has refused to make a claim in any form for that part of the vested property to which it or its non-enemy stockholders may be entitled under the decision in the *Uebersee* case. The management prefers to risk all or nothing on its ability to prove complete freedom from "enemy taint"; it has refused and still refuses to present the "*Uebersee* issue."[5] Obviously, such a claim would require the segregation of non-enemy from enemy interests. As the Government alleges enemy interest or enemy taint by and through the management stockholders, termed the "Sturzenegger Group," a serious conflict is raised between the self-interest of the management group and the interests of the corporation, thus preventing assertion of the "*Uebersee* issue," in violation of management's fiduciary duty to the corporation and its stockholders (R. 51-53).

After the principal action had been pending for one year, but before the action was formally at issue, both I. G. Chemie and the Government stated for the record that they were about to effect a settlement, which would dispose of title to the vested property, and for an amount which—as petitioners have alleged and respondents nowhere contradict—is substantially less than the value of the proportionate interest of the non-enemy stockholders in the vested property (R. 57-58).

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[5] The theory of the corporation, in its complaint, excludes the possibility of recovery upon the *Uebersee* issue. The *Uebersee* issue requires an entirely different order of proof, which the corporation refuses to make in this case. See the *Uebersee* case on remand to the District Court, 82 F. Supp. 602, 606 (1949).

Position of Your Petitioners. Thereafter, in March 1950, petitioners,[6] who are citizens of the United States, as non-enemy shareholders of I. G. Chemie, on behalf of themselves and all others similarly situated, moved to intervene in the corporation's suit in the U. S. District Court for the District of Columbia in order to present for adjudication an alternative issue—that only part of the property of I. G. Chemie should be retained by the Custodian if I. G. Chemie should be found to be enemy or enemy tainted—and otherwise to protect their interests in the property under the control of the Court (R. 44). The amended motion for leave to intervene and the proposed amended complaint in intervention were supported on the record by shareholders owning over 11,000 ordinary or common shares of I. G. Chemie out of a total of approximately 140,000 shares outstanding, and having a current market value of about $1,800,000 (R. 69).

Petitioners concurrently therewith, on their own behalf, brought suit under Section 9(a) of the Trading With the Enemy Act in the United States District Court for the Southern District of New York (R. 85).

In *Uebersee* this Court specifically left open for subsequent judicial or legislative clarification the question whether there must be a fractional return of vested corporate property proportionate to the non-enemy ownership in a foreign non-enemy corporation. There this Court stated (p. 489):

> "It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally

[6] They are now and have been at all times since December 6, 1941, non-enemy residents of New York (R. 48) and the sole and beneficial owners of 86 shares of the capital stock of I. G. Chemie having a current market value of about $15,000 (R. 50).

of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification."

In a case decided by the United States Court of Appeals for the Second Circuit, *Standard Oil Co.* v. *Clark*, 163 F. 2nd 917, while the *Uebersee* case was awaiting decision in this Court, a fractional return of vested corporate property was in fact made where the ultimate enemy and non-enemy ownership was mixed. Subsequent to its decision in *Uebersee*, this Court denied certiorari in *Standard Oil*, 333 U.S. 873. From these decisions it would appear that the right to a fractional return of the proportionate non-enemy interest in I. G. Chemie's vested property exists even if the corporation is found to be enemy. However, the question still remains unanswered whether that right in the vested property should be claimed on behalf of the corporation or by the non-enemy shareholders as a class in the corporate action or by the individual shareholders proceeding independently of each other in separate actions.

The motion for leave to intervene, together with the supporting papers, presupposes that the claim should be made by the corporation, or if it refuses, on its behalf; and in any case, since the vested property is before the court in the corporate action the shareholders must intervene in that action in order to protect their interest in the property, for the outcome of that action, whether by judgment or settlement, might be binding upon the stockholders and will adversely affect any interest which they may have in the property. However, the law is unsettled and it was therefore necessary for your petitioners also to sue in New

York under Section 9(a) of the Act in order to toll the possible running of the Statute of Limitations (Sec. 33, Trading With the Enemy Act, Appendix Page 26, *infra*), if it should by any chance develop that the claim is that of the stockholders, each of them proceeding by separate actions, albeit with respect to the same property.

The adverse determination of the Court of Appeals for the District of Columbia Circuit on the amended motion to intervene and proposed amended complaint in intervention is the subject of this petition. The proposed complaint in effect alleges that an alternative claim exists for the return of the vested property proportionate to the non-enemy ownership of I. G. Chemie; that the management of the corporation refuses to make such a claim, for, being themselves charged with enemy taint, their personal and financial self-interest is in conflict with their fiduciary duty to make such a claim in behalf of the corporation; and that accordingly your petitioners are entitled to intervene for that purpose because your petitioners and all other non-enemy stockholders similarly situated are or may be bound by the judgment in the action (R. 47-57).

The complaint also alleges that the non-enemy stockholders as a class have an interest in certain property under the court's control; that the stockholders as a class would be adversely affected by a disposition of the property and are without adequate protection unless they are allowed to intervene (R. 66-67).

The complaint further alleges that I. G. Chemie and the Government announced their intention to effect an early settlement of the principal action for an amount far below the value of the proportionate non-enemy interests in the vested property; that the proposed settlement does not take into account the claim indicated in the *Uebersee* case; that the settlement would be made with the corporation and thus would be for the ultimate benefit both of persons eligible and of persons ineligible for the return of property vested under the Trading With the Enemy Act; that the benefits accruing to ineligible persons would be at the ex-

pense of the eligible non-enemy stockholders of I. G. Chemie; that such a settlement was contrary to the provisions of the Trading With the Enemy Act; that the I. G. Chemie management desired the settlement for its own purposes rather than for the welfare of the stockholders, particularly non-enemy stockholders; and that your petitioners and other stockholders similarly situated were entitled as a matter of right to intervene to protect their interests (R. 57-66). The prayer of the complaint requested, in effect, the return of a portion of the vested property commensurate with the non-enemy ownership of I. G. Chemie and, in any case, that the proceeds of any partial judgment or settlement be turned over to the corporation under such orders of the court as would effectively prevent the ultimate benefits thereof from reaching persons ineligible under the Trading With the Enemy Act until after all other interests in the corporation should be made whole (R. 67).

Position of I. G. Chemie and the Government. Neither I. G. Chemie nor the Government, in any of its affidavits, briefs, or oral argument, has ever challenged the substantive allegations of your petitioners' proposed complaint in intervention. Counsel for the management of the corporation has merely taken the position that the claim therein asserted is without merit and that in any case your petitioners have no standing to intervene to compel the assertion of the claim which the corporation refuses to assert, to protect their interest in the vested property, or to contest the contemplated settlement regardless of its terms. Both the Government and the corporation have taken the position that, if by some remote contingency there exists a right to a partial return of the vested property, that right can be exercised only by separate individual suits by each shareholder against the Government, notwithstanding the likelihood that such right may be foreclosed by settlement,

or by any judgment in this action, whether for or against the corporation.[7]

Your petitioners base their procedural right to intervene in the District of Columbia action upon the provisions of Rule 24(a), Federal Rules of Civil Procedure, and the opinion of this Court in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941).

The Decisions of the Courts Below. The District Court denied your petitioners' amended motion for leave to intervene without indicating any specific grounds for the denial. In an opinion delivered from the bench, the court stated that it believed the petitioners had not established a clear right to intervene and that it reached its decision notwithstanding the fact that the court's views were counter to the trend of judicial opinion to permit persons who can show some color of right to proceed by intervention. The *Uebersee, Standard Oil,* and *Missouri-Kansas Pipe Line* cases were argued and briefed at length to the court but were neither discussed nor referred to in its decision.

The Court of Appeals affirmed the decision of the District Court in a short opinion. It held that your petitioners had no right to intervene under the provisions of Rule 24(a)(2), authorizing intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," on the ground that your petitioners will not be bound by a judgment in the action because they cannot be deprived of any right to a share of the vested corporate property in a suit to which they are not

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[7] It may be of interest to note that the Government moved to dismiss the complaint in the New York action on the ground that only the corporate entity whose property was vested is a proper claimant under the Trading With the Enemy Act. Therefore, it argued, petitioners' rights, if any, should be adjudicated in the District of Columbia action. The Government's motion to dismiss was denied.

parties. The court neither cited authority for nor discussed this unusual assumption. It also held that your petitioners had no right to intervene under the provisions of Rule 24(a)(3), which provides for intervention when the applicant is so situated as to be adversely affected by a "distribution or other disposition of property which is in the custody or subject to the control or disposition of the court," because it said this provision contemplates that the intervenor should have a legal interest in the property in the custody of the court, and a stockholder has no such interest in vested corporate property.

There was no mention whatever of the issue as to whether the corporation or its non-enemy stockholders had a legal or equitable interest either within the meaning of that term as used in Section 9(a) of the Trading With the Enemy Act, or otherwise, in that part of the property proportionate to the non-enemy shareholdings which would be adversely affected by disposition of the property. Although the *Uebersee, Standard Oil,* and *Missouri-Kansas Pipe Line* cases were fully briefed and argued to the Court of Appeals, they are not even cited, much less discussed or distinguished, in the opinion of the court. Moreover, the Circuit Court completely ignored the trend of decision to the effect that the corporate entity will not be allowed to prevent judicial protection of stockholders' interests in a proper case, such as when there are conflicts of interest. This Court, in the *Uebersee* case, in overruling *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457 (1925), in effect enabled the Custodian to look behind the otherwise non-enemy corporate facade to reach enemy interests. At the same time, this Court preserved for future decision the protection to be afforded non-enemy interests when the Custodian does so. The Custodian cannot have it both ways. If he may properly disregard the Swiss incorporation in order to reach enemy interests hidden thereby, he cannot at the same time deny employment of the same process to uncover and protect the non-enemy interests. To do otherwise would be violative

of the constitutional right of non-enemy stockholders to just compensation under the Fifth Amendment.

The holding of the Circuit Court that your petitioners will not be bound by the judgment in the action and the holding on the other hand that your petitioners have no legal interest in the vested corporate assets are not only inconsistent with the holdings of this Court, but are inconsistent with each other.* Implicit in the court's holding that your petitioners will not be bound by a judgment in the corporate action is the conclusion that the corporation has no right to a fractional return of the vested property. But cf. *Standard Oil Co.* v. *Clark, supra,* and the *Uebersee* case. Implicit in the court's holding that the stockholders have no direct legal interest in the vested corporate property is the conclusion that a non-enemy stockholder has no right to a fractional return of vested corporate property. Thus the Circuit Court has without warrant completely ignored the *Uebersee* case in word and in action and has in effect held that, as a matter of law, there cannot be a partial return of vested property where only a fractional enemy interest appears. Yet at the very end of its opinion, the court nonetheless stated that it expressed no opinion with regard to the New York action.

REASONS FOR GRANTING THE WRIT.

I. The questions expressly reserved for future decision in the *Uebersee* case are vital both to the proper administration of the Trading With the Enemy Act and to this petition. These questions are now raised for the first time in this Court and in a case presenting fundamental and far-

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*It is interesting to note that the Court of Appeals relies in part for its holding under Rule 24(a)(3) upon *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, without referring to the fact that the Supreme Court ultimately held in the *Missouri-Kansas* case that the applicant for intervention in the *Columbia Gas* case in fact had a right to intervene in the action.

reaching consequences. They are quoted *in extenso* at page 6 of this petition.

The petition also presents the vital issue as to the proper method of raising this question where the management of the corporation refuses to assert the claim because the assertion or adjudication of such a claim is contrary to its own financial interest.

If the corporation only through its management is deemed to be a proper claimant, denial of intervention in the instant case effectively precludes assertion of the claim. If the non-enemy stockholders have any interest in the property they can be protected only by intervention. If the stockholders as individuals are the proper claimants, granting of intervention is essential, for otherwise serious complications would be presented: (a) Adjudication or settlement of the corporate claim, and the consequent removal of the assets or their proceeds beyond the jurisdiction of American courts, will make academic any real relief through numerous separate suits by stockholders. (b) If the stockholders have preserved their possible individual rights by filing administrative claims with the Alien Property Custodian, such a multiplicity of actions with respect to the same vested property will result from separate suits to enforce such rights as seriously to interfere with the administration of the Trading With the Enemy Act. (c) Alternatively, if the stockholders are believed to have failed to protect their possible individual rights, having relied upon the claims filed by their corporate management, their individual rights might possibly be barred by the Statute of Limitations.*

* It must be noted that prior to the decision in *Uebersee*, a corporation organized under the laws of a non-enemy country was entitled under Section 9(a) of the Act to the return of all of the vested assets. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457 (1925). It is now unclear whether the Statute of Limitations is tolled for all purposes by virtue of the initiation of a Section 9(a) suit by the corporation.

In sum, intervention is essential under any set of circumstances to protect the position of the non-enemy stockholders from being adversely affected by the disposition of the corporate suit, whether by judgment or settlement.

2. The holding of the court below that your petitioners as stockholders will not be bound[10] by the judgment in the corporate action must be premised either upon the theory that (1) the right to a fractional return does not exist, or that (2) the corporate entity is not the proper claimant of the right. If the holding is based upon the theory that the right does not exist, the decision of the Circuit Court conflicts in principle with *Standard Oil Co.* v. *Clark*, 163 F. 2nd 917 (C.C.A. 2d), cert. denied, 333 U.S. 873, where, in fact, complicated intermixtures of enemy and non-enemy ownership in vested assets were unraveled as a basis for decreeing the return of vested assets commensurate with the non-enemy ownership. If the court's holding is based upon the theory that the corporation is not the proper claimant of the right, the conclusion conflicts with the second holding of the court below, namely, that your petitioners do not have an interest in the assets under the control of the court. The holding of the court thus becomes, in effect, a determination on the merits that the "*Uebersee* issue" cannot in fact exist.

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[10] The fact that stockholders will be bound by a judgment in an action to which the corporation is a party has traditionally been a basis of stockholder intervention under Rule 24(a)(2), F. R. C. P., e.g., *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941); *Pyle-National Co.* v. *Amos*, 172 F. 2nd 425 (C. A. 7, 1949); *Park & Tilford, Inc.* v. *Schulte*, 160 F. 2nd 984 (C. C. A. 2, 1947); cf. Note, *Shareholder Intervention in Corporate Litigation*, 63 Harvard L. Rev. 1426, 1429 (1950). Accordingly, the holding of the court below must have been based on the theory that the corporation does not have the right to assert a claim for the return of the non-enemy fractional interest in the vested assets. If the corporation does not have that right, it must accrue to the stockholders as individuals, in which event the court below is clearly wrong in holding that your petitioners, as stockholders, do not have the necessary "interest" under Rule 24(a)(3) F. R. C. P.

3. The instant petition involves an important question as to the practice of intervention under Rule 24(a) of the Federal Rules of Civil Procedure and the decision of this Court in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941).

In this case, the law is unsettled, the issues are of great public importance and the interests of your petitioners and of other stockholders of I. G. Chemie similarly situated cannot be adequately protected except by the intervention requested. In the markedly similar situation that existed in the *Missouri-Kansas* case, this Court granted intervention. It is submitted that the doctrine of that case and the rationale of Rule 24(a) F.R.C.P. are designed to protect your petitioners in the face of the circumstances confronting them. Rule 24(a)(2) speaks in terms of an applicant for intervention whose interests are or *may be* inadequately represented by existing parties, and who is or *may be* bound by the judgment in the action. Rule 24(a)(3) speaks in terms of an applicant so situated as to be adversely affected by the disposition of property under the control of the court. All the questions raised in this petition, your petitioners pressed vigorously on the courts below. The implications of the *Uebersee*, *Standard Oil* and *Missouri-Kansas* cases were fully argued. Yet without any reference to these questions or discussion of these cases, it was held that your petitioners could neither be bound by the disposition of the action nor have any interest that could be adversely affected by the disposition of the vested assets under the control of the court.

With respect to the provisions of Rule 24(a)(2), it seems clear that the management of I. G. Chemie, which holds a substantial stock interest and which is itself charged with "enemy taint" in the principal action, has a personal and financial self-interest in precluding any adjudication of a claim made under the *Uebersee* case. Adjudication of that claim not only would subject the management to a possible judicial determination that it was an enemy "cloak," but under established corporation law would also preclude it,

as enemy, from participating in the benefits of any assets returned under the Trading With Enemy Act.[11] Clearly, then, such a management will not and cannot properly discharge its fiduciary obligations to the corporation and to its non-enemy stockholders vis-a-vis the Trading With the Enemy Act. Equally clearly, such a management does not adequately represent the non-enemy stockholders, nor their interests, within the language of Rule 24(a)(2).

That the non-enemy stockholders may be bound by the judgment in the action has already been discussed herein.[12] That the non-enemy stockholders in any case will be adversely affected by a disposition of the assets in the control of the District of Columbia court, within the meaning of Rule 24(a)(3), has likewise been previously discussed.[13]

Thus, your petitioners have a right to intervene under 24(a)(2) if the claim is that of the corporation. If the claim is that of the stockholders, the stockholders plainly have an "interest" in the vested assets and will be "adversely affected" within Rule 24(a)(3) and can intervene thereunder.

4. The present petition involves vital and fundamental questions in the administration of the Trading With the Enemy Act. This case alone affects the interests of American, British, Dutch, French and Swiss stockholders, among others, who are nationals of allied or neutral countries or persecutees of our enemies in the last war—non-enemy stockholders, numbering in the thousands, of a corporation organized under the laws of a non-enemy country. This

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[11] E.g., *Backus* v. *Finkelstein*, 23 F. 2nd 357 (D. Minn. 1927), app. dismissed, 31 F. 2nd 1011 (C. C. A. 8, 1929); *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645 (1917); *Brown* v. *DeYoung*, 167 Ill. 549, 47 N. E. 863 (1897). A court of equity will not permit wrongdoing stockholders to participate in the corporation's recovery in connection with such wrong, at the expense of innocent stockholders.

[12] See page 13, *supra*.

[13] See page 13, *supra*.

case itself involves the disposition of vested assets valued between $50,000,000 and $100,000,000. The Department of Justice has stated that the issues upon which this petition is based may involve as much as $185,000,000 in vested property, and could only vaguely estimate that the number of non-enemy stockholders of foreign corporations whose property was seized runs into the thousands.[14] Moreover, it is the policy of our Government to encourage private American and Allied investments abroad to assist in the rehabilitation of a war-torn world, and uncertainties as to the protection to be afforded and the constitutional rights of minority American and allied interests in foreign corporations which can possibly come under enemy domination in time of war, will inevitably curtail the amount of such investments.

5. In sum, this Court in the *Uebersee* case expressly left open the question, extremely vital to the administration of the Trading With the Enemy Act, under what circumstances the right to a fractional return of vested corporate property exists, in whom such right exists, and for whose benefit it exists and how it may be enforced.

The present action is not only the first but will be the most important case to be presented to this Court directly involving that question. Nevertheless, the decision of the court below, completely ignoring the pertinent cases, applies a most narrowly-construed procedural device based on patently self-contradictory interpretations of the nature of such right, effectively to foreclose the raising of this question in this action or in any other case of like circumstances.

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[14] See statement of Harold F. Reis, Acting Chief, Legal Branch, Office of Alien Property, Department of Justice, in House Hearings on H. R. 6808, etc., 81st Cong., 2nd Sess., pages 402, *et seq.*

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 3, 1951.

APPENDIX A.

Trading With the Enemy Act, as Amended.

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign or otherwise dispose of or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SEC. 5. (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or

any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like

fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided*, That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided further*, That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

SEC. 7. (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefore, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation

shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom

and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then

such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

Federal Rules of Civil Procedure, as Amended.

RULE 24

INTERVENTION

a. *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof.

Office Supreme Court, U.S.
FILED
DEC 13 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 172.

ERIC G. KAUFMAN and AENNI C. KAUFMAN,
Petitioners,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC.,
Respondents.

BRIEF FOR THE PETITIONERS.

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HENRY G. FISCHER,
SEYMOUR GRAUBARD,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 172.

ERIC G. KAUFMAN and AENNI C. KAUFMAN,
Petitioners,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC.,
Respondents.

BRIEF FOR THE PETITIONERS.

Eric G. Kaufman and Aenni C. Kaufman, your petitioners, are non-enemy stockholders[1] of Societe Internationale pour Participations Industrielles et Commerciales S. A., a Swiss corporation.[2] On their own

[1] The term "non-enemy" is used herein for the sake of brevity to mean not an enemy, enemy national, an ally of an enemy, a national of an ally of enemies, a national of a designated enemy country, or a national of Germany or Japan, within the meaning of the Trading With the Enemy Act, as amended. Thus the term "non-enemy" excludes any person who might be deemed a national of Germany or Japan within Sec. 39 of the Act.

[2] Hereinafter variously referred to as "I. G. Chemie", "the corporation", or "plaintiff".

behalf and on behalf of all other non-enemy stockholders of the corporation similarly situated, they present for review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled action on April 5, 1951, affirming the order of the District Court which denied petitioners' amended motion for leave to intervene in the action brought by the above corporation against the Government under Section 9(a) of the Trading With the Enemy Act.[3]

Opinions Below.

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 79) is reported at 188 F. 2d 1017 (April 5, 1951). The oral opinion of the District Court (R. 74) is unreported.

Jurisdiction.

The judgment of the Court of Appeals for the District of Columbia was entered on April 5, 1951 (R. 81). The petition for a writ of certiorari was filed on July 3, 1951, and was granted on October 15, 1951. The jurisdiction of this Court rests on 28 U. S. C. Section 1254.

Questions Presented.

The fundamental questions posed by this Court in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 489, 490 (1947), as awaiting "legislative or judicial clarification" are here presented for review.

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[3] The Trading With the Enemy Act, 50 U. S. C. App. §1 *et seq.*, for convenience, is frequently hereinafter referred to as the "Act".

A Swiss corporation, whose American assets have been vested by the Alien Property Custodian,[4] has some enemy shareholders. It is charged by the Government with being owned or controlled through its management stockholders by I. G. Farben, a German corporation. The total shareholdings of non-enemies in the Swiss corporation, having no connection with the management or with I. G. Farben, amount to over one-third of the outstanding voting stock and represent more than one-half of the ownership equity in the Swiss corporation.

In these circumstances "what part of a friendly alien corporation's property may be retained"[5] by the Government?

That basic issue has been stated in the petition for review, in three separate but related questions, as follows:

> Do American and other non-enemy stockholders of a Swiss corporation have a right to intervene as a class[6] in an action brought by that corporation under Section 9(a) of the Trading With the Enemy Act to recover property vested by the Alien Property Custodian—

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[4] Included in the vested assets is some 93% of the stock of General Aniline & Film Corporation, plus some millions of cash on deposit. It has been admitted by the Government that the vested assets may have a value in excess of one hundred million dollars (R. 16).

[5] *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 490 (1947). More extensive quotations and analysis of the *Uebersee* case are set forth at pp. 17 *et seq.*, *infra*.

[6] Non-enemy shareholders of the corporation owning over 11,000 ordinary or common shares out of a total of approximately 140,000 outstanding have filed an affidavit supporting petitioners in this proceeding (R. 69).

(1) where the management of the corporation, because of financial self-interest, violates its fiduciary obligation to the corporation and its stockholders by deliberately refusing to assert a claim, even in the alternative, for the return of the proportionate non-enemy interest in the vested property, although such claim has been specifically reserved by this Court in the *Uebersee* case for future decision, and the corporate management by its refusal may cause substantial loss to such American and other non-enemy stockholders?

(2) where the management of the corporation and the Alien Property Custodian have affirmatively stated their intention to settle the corporate suit, and have not denied petitioners' allegations that such settlement (a) will be made for an amount far less than the vested assets proportionate to the non-enemy interests in the corporation and thus inadequate, and (b) will accrue to all stockholders alike, thus ultimately benefiting enemy stockholders at the expense of non-enemy stockholders, contrary to the purpose and provisions of the Trading With the Enemy Act?

(3) where the vested property is presently a fund subject to the control of the court, and disposition of the property will adversely affect the American and other non-enemy stockholders unless their interests are adequately represented in the proceedings?

Statutes Involved.

The relevant portions of the Trading With the Enemy Act, as amended, are set forth in Appendix A, *infra*, pages 53-60.

Statement.

The plaintiff, formerly and generally known as "I. G. Chemie", now known as "Interhandel", is a Swiss holding corporation. Between 1942 and 1946 all of its American assets, valued in excess of $100,000,000, and consisting of substantially all of the outstanding stock of its American subsidiary, General Aniline & Film Corporation, and certain cash balances, augmented by declaration of dividends, were vested by the United States on the ground that these assets were beneficially owned or controlled by I. G. Farbenindustrie, a German corporation and an enemy of the United States (R. 48).

On October 21, 1948, I. G. Chemie brought this principal proceeding in the United States District Court for the District of Columbia for the return of all of the vested property under Section 9(a) of the Trading With the Enemy Act. Its complaint is similar to that sustained by this Court in the *Uebersee* case in 1947 and alleges in substance that it is a corporation organized in and existing under the laws of Switzerland, a friendly neutral country, and that it was and is non-enemy (R. 1-15).

The Government in its answer to the complaint asserts in substance that I. G. Chemie was enemy and enemy tainted because a conspiracy allegedly existed among I. G. Farben, I. G. Chemie, and I. G. Chemie's officers and controlling management stockholders. The object of the alleged conspiracy was to "conceal, camouflage and cloak the ownership, control and dominion by I. G. Farben of properties" in many countries of the world including these particular prop-

erties in the United States; and that by virtue of the concealed, camouflaged and cloaked control, ownership and domination by I. G. Farben, the plaintiff corporation is not entitled to the return of any part of the vested property (R. 28-30).[7] Apart from the stock held by the management stockholders, as of 1940, approximately 11% of the total authorized stock of the corporation was owned by German nationals (R. 51).

The Government has asserted that the management, the so-called "Sturzenegger Group", has complete control over the affairs of the corporation,[8] without regard to the wishes or interest of the non-enemy stockholders who, as we have alleged, own over one-third of the outstanding voting stock which represents a majority investment in the corporation.[9] It is unquestioned that the petitioners and other non-enemy shareholders similarly situated have no connection

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[7] No other basis for retention of the vested property has been alleged.

[8] The Government has stated on the record: "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff." "He dominates the plaintiff" (R. 55). This assumption is apparently based on a stock ownership by the Sturzenegger Group of 136,000 shares out of a total authorized and issued capital as of 1940 of 350,000 shares. Of the stock said to be owned by this Group, 100,000 shares represent preferred stock with full voting rights, for which only 20% of par value, or 2 million Swiss francs, equivalent to $460,000, was paid in as of 1940.

[9] In addition to the clearly non-enemy interest, a substantial, but as yet undetermined, number of shareholders designated as German individuals in 1940, were not in fact German or enemy as of December 7, 1941, or were specifically exempted from the category of enemy by Section 32 of the Act because of racial, religious or political persecution. As a matter of fact, the Kaufmans, petitioner-intervenors, who are now American citizens and residents, are precisely in that category of shareholders.

with the management group or with anyone else who might be a party to any such conspiracy.

Faced with the Government's contention that no return of any kind can be made because of the alleged concealed I. G. Farben ownership and control exercised through the "Sturzenegger Group", the corporation has refused to make any claim, even in the alternative, for partial return of the vested property, notwithstanding the very substantial interest of the non-enemy shareholders. The Government has not disputed this non-enemy interest. The corporation, *i. e.*, the Sturzenegger management, has preferred to risk all (a total of over 100 million dollars) or nothing on its ability to prove complete freedom from enemy taint. The self-interest of plaintiff's management impels it to avoid any issue as to its "enemy taint". Notwithstanding its fiduciary obligation to the corporation as a whole and to its non-enemy stockholders, that self-interest has thus far prevented any claim in this action of—what has been termed—the "Uebersee issue".

Indeed, after this 9(a) action had been pending for over one year but before issue was finally joined, both I. G. Chemie and the Government explicitly stated for the record that they were about to effect a settlement which would dispose completely of the corporation's title and claim to the vested property. The proposed settlement is imminent and is for an amount which—as petitioners have alleged and respondents have nowhere for the past year and one-half contradicted—is very substantially less than

the value of the proportionate interest of the non-enemy shareholders in the vested property (R. 57-58).

Moreover, such settlement, which would be distributed to enemies and non-enemies alike, would cause further dilution of the non-enemy interest in a manner contrary to the purposes of the Act. For example, if in settlement $20,000,000 were paid to the corporation and the Government thereby received undisputed title to $100,000,000 of vested assets, and if non-enemy shareholders numbered 60%, they would benefit to the extent of 60% of $20,000,000 or $12,000,000, instead of 60% of $100,000,000, or $60,000,000. Furthermore, the Sturzenegger Group, as well as the acknowledged enemies would benefit by the settlement to the extent of $8,000,000. Such a settlement, which the Government is about to conclude in this fashion, is being arranged solely with the very persons and interests claimed by the Government to be cloaking for the enemy. Only petitioners' intervention stands in the way of this settlement.

Petitioners, for themselves and on behalf of all other non-enemy shareholders similarly situated (American, Swiss and other neutral and allied nationals), have moved to intervene in the suit brought by I. G. Chemie in the United States District Court for the District of Columbia in order to present these matters for adjudication, over the opposition of the management. While petitioners own only eighty-six shares of stock valued at $15,000 (over $60,000 if petitioners are successful herein), their motion for intervention and the proposed amended complaint in intervention is supported by an affidavit of a protective committee formed in Switzerland of non-

enemy shareholders owning over 11,000 shares of the ordinary stock of I. G. Chemie[10] (R. 69-71).

The proposed amended complaint in intervention alleges in substance that the corporation is and has been non-enemy at least to the extent that it is and has been owned by non-enemies; that a claim exists for the return of the vested property proportionate to the non-enemy ownership of I. G. Chemie; that the management of the corporation refuses to make such a claim, for, being themselves charged with enemy taint, their personal and financial self-interest is in conflict with their fiduciary duty to make such a claim in behalf of the corporation; and that accordingly your petitioners are entitled as of right to intervene for that purpose because your petitioners and all other non-enemy stockholders similarly situated are or may be bound by the judgment in the action (R. 47-57).

The proposed complaint alleges, as an additional and alternative claim to the foregoing, that the non-enemy stockholders as a class have an interest in the vested property which has been placed under the control of the Court; that these stockholders would be adversely affected by disposition of the property and are without adequate protection unless they are allowed to intervene as of right (R. 66-67).

Finally, the proposed complaint alleges (and it is nowhere contradicted), that I. G. Chemie and the Government are about to settle the principal action

[10] These 11,000 shares had a market value as of the date of filing of approximately $1,800,000. The stock of I. G. Chemie is regularly quoted on the Zurich Stock Exchange in Switzerland and the current quotation is substantially in excess of this amount.

for an amount far below the value of the proportionate non-enemy interest in the vested property; that the proposed settlement does not take into account such interest and any claim based thereon; that the settlement would be made with the corporation and thus would be for the ultimate benefit of persons ineligible for the return of vested property under the Act; that the benefits thus accruing to ineligible persons would be at the expense of the non-enemy stockholders; that such a settlement is contrary to the purposes of the Act; that the I. G. Chemie management seeks such settlement for its own purposes rather than for the welfare of its stockholders; and that your petitioners and other non-enemy stockholders similarly situated are entitled as a matter of right to intervene to protect their interests (R. 57-66).

The prayer of petitioners' complaint requests, in effect, the return of a portion of the vested property commensurate with the non-enemy ownership of I. G. Chemie and, in any case, that any such proceeds, whether attained by judgment or settlement, be turned over to the corporation, subject to order of the court so as effectively to prevent the benefits thereof from reaching persons ineligible under the Trading With the Enemy Act, at least until after all other interests in the corporation shall have been made whole (R. 67).

In short, the motion for leave to intervene, together with the supporting papers, premises: either that the corporation is the appropriate claimant to insure partial return of the vested assets proportionate to the non-enemy interest in the corporation, and if the corporation refuses to make such a claim, then the non-

enemy shareholders must do so on its behalf; or that the non-enemy shareholders as a class must intervene in the corporate action in order to protect their interest in the property before the court, for the outcome of the principal action (whether by judgment or settlement), would dispose of the property under the control of the court, and might be binding upon the stockholders and would adversely affect their interest.

Since the law appeared to petitioners to be unsettled and there was a possibility that the statute of limitations might be deemed to apply to petitioners as individuals, petitioners, concurrently with the filing of the motion for intervention, also brought a holding action in the District Court for the Southern District of New York under Section 9(a) of the Act (R. 83-86), in order to toll any possible running of the statute of limitations (Sec. 33, Trading With the Enemy Act, 50 U. S. C. App. §33).

Specification of Errors.

The Court of Appeals for the District of Columbia erred:

1. In affirming the judgment of the District Court denying petitioners' amended motion for leave to intervene.

2. In failing to hold that petitioners are entitled to intervene as of right under Rule 24(a)(2) F. R. C. P., in view of the fact that the plaintiff corporation has refused to assert the claim that the Government may not retain all of the vested assets of the corporation where substantial non-enemy interests are involved, and that the representa-

tion of the claim as thus far asserted on behalf of the plaintiff corporation is or may be inadequate and petitioners are or may be bound by a judgment in this action.

3. In failing to hold that petitioners are entitled to intervene as of right under Rule 24(a)(3) F. R. C. P., in view of the fact that petitioners and other shareholders of the plaintiff corporation similarly situated have an interest in the fund under the disposition and control of the court which has been or may be confiscated, unless petitioners are permitted to intervene and establish such interest so as to limit the Government's claim for retention to the enemy interests involved.

4. In failing to hold that petitioners and other non-enemy stockholders are entitled to intervene as of right to prevent an imminent settlement of the litigation which would frustrate the purposes of the Trading With the Enemy Act,

5. In holding that petitioners are not entitled to intervene as a matter of right, notwithstanding that its judgment denies to petitioners and to other shareholders similarly situated their right to just compensation and to due process under the Fifth Amendment.

Summary of Argument.

A Swiss corporation with some enemy ownership is charged by the Government with being owned or controlled by an enemy through its management stockholders. The basic issue is: what part of the vested assets of a neutral corporation may be retained where only a fractional enemy ownership exists.

I.

The Government must return the vested assets of the plaintiff corporation to the extent of the non-enemy interest therein.

Prior to the amendment of Section 5(b) of the Trading with the Enemy Act in 1941, a Swiss corporation could obtain the return of all its vested property irrespective of any enemy ownership. The purpose and effect of the amendment of Section 5(b) was to enable the United States Government to reach and retain enemy interests which masqueraded behind such a neutral corporation, but not to appropriate friendly or neutral assets. As a result of the amendment, such a corporation must be regarded as non-enemy to the extent of its non-enemy interest, but may be treated as enemy to the extent of the enemy interest therein which the Government is now enabled to reach.

Subsequent to the *Uebersee* case, the courts, as well as the Custodian, have recognized this right and have permitted confiscation of assets only to the extent of the enemy interest. Where a domestic corporation is involved, the Custodian has vested only the enemy stock interest, even though it may constitute an overwhelming majority. Where a foreign corporation is involved, administrative necessity may require the vesting of the American assets, as distinguished from the stock of the corporation, in order to reach the enemy interest therein; but there is no greater justification under the Act and under the Fifth Amendment for retaining all of the American

assets of that corporation, than there is for retaining all of the assets of a domestic corporation having a substantial enemy interest.

The right of a partial return of vested assets of a neutral corporation to the extent of the non-enemy interest has been recognized in executive as well as legislative actions and in the foreign policy of the United States, but has been inexplicably denied in this case. Every policy and constitutional consideration favors recognition of the right of return.

II.

The right to partial return is in the corporation.

Because of personal self-interest, this corporate management refuses to assert the claim. Neither the corporation nor the Government can give any reason of substance or of policy, to deny that the right is in the corporation. On the contrary, the Government's own administrative rulings and its practice in settling other cases involving neutral corporations, have recognized that the proper claimant is the corporation.

In any case, non-enemy stockholders have a right to be heard in the proposed settlement in order to raise these considerations and to prevent distribution of the proceeds in a manner contrary to the purpose of the Act. A court of equity has adequate power to deal properly with matters of this kind.

III.

The right to partial return can be asserted only by intervention.

The management cannot and will not properly discharge its obligations to the corporation and its non-enemy stockholders consistent with the Act. Intervention is necessary since the representation of the interest of the non-enemy shareholders has been demonstrated to be inadequate, indeed, non-existent; the non-enemy shareholders may be bound by judgment in the action or by settlement; and they have an interest in the assets before the court.

ARGUMENT.

Introduction.

The essential question is whether upon the facts alleged in the proposed complaint in intervention there is an enforcible right to return of the vested property to the extent of the separable non-enemy ownership of I. G. Chemie. There is no issue presented to this Court as to whether any assets of I. G. Chemie, wherever located, were employed in economic warfare against the United States or its allies. Nor is any question presented by any of the pleadings in this case now before the Court, whether I. G. Chemie did business within enemy territory. Here we are concerned solely with the effect of partial enemy ownership of a neutral corporation upon the right of the corporation to the return of its vested property.

We submit that there is an enforcible right to return of the vested property to the extent of the separable non-enemy ownership and that that right is properly in the neutral corporation. Since the corporate plaintiff has refused to assert the right, the non-enemy shareholders must be permitted to intervene for that purpose. In any case, it is necessary in the present circumstances that intervention be granted, if only to guard against an imminent, improvident and illegal settlement.

In the courts below we pointed out that the court need not determine whether petitioners' claims, as set forth in the proposed complaint in intervention, would be ultimately successful. It was enough, we urged, to decide whether petitioners for themselves and for others similarly situated had the "standing to make the claim before the district court". *Missouri-Kansas Pipe Line Co.* v. *U. S.*, 312 U. S. 502, 508 (1941).

In the courts below a decision as to the merits of the proposed complaint in intervention would not have been decisive. Although the technical requirements of intervention no more demand a final judgment of this Court than of the lower court as to the merits of petitioners' claims, the situation here, we submit, is different. We suggest that this Court can, and should, consider petitioners' motion for leave to intervene as raising the issue of the sufficiency of the proposed complaint in intervention, and thus provide guidance for all future proceedings in this litigation. *Cf.* 4 Moore's Federal Practice (2d Ed.), §24.07.

I.

The Government Must Return the Vested Assets of the Plaintiff Corporation to the Extent of the Non-Enemy Interest Therein.

A. The Act and the *Uebersee* Case.

The legislative history of the Trading With the Enemy Act and of the amendment to Section 5(b) of the Act in 1941 was fully briefed and considered in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480 (1947).

As was made clear in the *Uebersee* case, prior to the last war any neutral corporation not doing business in enemy territory, such as I. G. Chemie, could have recovered all its vested property on the basis of its naked legal "title" because it was not specifically defined as "enemy" in Section 2. Judicial return under Section 9(a) was available to *any* person not an enemy "claiming any interest, right, or title" in vested property. That the beneficial "right" or "interest" belonged to stockholders who were specified as enemies in Section 2, and whose interest the Custodian had tried in vain to reach and retain, did not prevent return. *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457 (1925); *Hamburg-American Line T. & N. Co.* v. *U. S.,* 277 U. S. 138 (1928).

The effect of the amendment of Section 5(b) was to overcome the limitations of the *Behn* and *Hamburg* cases. At the same time the *Uebersee* case also made clear that the vesting powers granted by

Section 5(b) for the purpose of reaching enemy interests were not coterminous with the right to retain. This Court rejected the Government's argument that it had power to retain all the foreign property vested. Nor did the Court accept the Government's suggestion that a remedy in the Court of Claims be created to save the constitutionality of a statute construed in so drastic and novel a fashion. *Cf. Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C. C. A. 2, 1947), *infra*, pp. 21-23. Rather, as this Court stated in the *Uebersee* case, the intent of the Congress and the effect of the amendment to Section 5(b) were to enable the Government "to reach enemy interests which masqueraded behind those innocent fronts"—"not to appropriate friendly or neutral assets". 332 U. S. at p. 485.

In rejecting the contention of the Government, this Court said:

> "* * * It is hard for us to assume that Congress adopted that drastic course in the case of friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control. Our hesitation is, moreover, increased when we note that §7(c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment." 332 U. S., at pp. 487-488.

Inasmuch as the complaint in the *Uebersee* case alleged that the corporation was not owned in whole

or in part by an enemy, the Court found it unnecessary to decide what mode of relief should be accorded either the Government or the claimant in a case where the enemy had a partial interest:

> "It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification." 332 U. S., at pp. 488-489.

"What part of a friendly alien corporation's assets may be retained where only a fractional enemy ownership appears" is the basic issue here. We submit that the amendment to Section 5(b) did not create any new or greater rights to retain any interests other than enemy. It did not in any way limit the right of return of friendly neutral interests in property which had

been vested in order to reach enemy interests in that property.

This view accords with the suggestion in the *Uebersee* case that Section 2 may now be construed to be "merely illustrative, not exclusionary" (332 U. S. at pp. 488-9). For purposes of Section 2, and therefore of Section 9(a), a neutral corporation may be treated as enemy to the extent of that enemy interest which a court determines that the Custodian is entitled to reach. Correlatively, a neutral corporation must still be treated as non-enemy for the purposes of Section 2 to the extent of the non-enemy interest. In short, a neutral corporation may sue under Section 9(a), but its recovery may be limited to the extent of the non-enemy interests.

The Government cannot have it both ways—it cannot assert that Section 5(b) of the Act enables it to penetrate the neutral corporation in order to reach and retain enemy interests behind it, and at the same time assert its impenetrability, in order to deny return of the substantial separable non-enemy interests.

B. Developments Subsequent to *Uebersee*.

In our view, the right to partial return is but the logical development of the *Uebersee* case and of established Constitutional prescriptions and standards of statutory construction. The judicial, legislative and executive developments that have followed the decision in the *Uebersee* case, and the policy and constitutional considerations inherent therein, all abundantly support the position we here urge upon the Court.

1. Judicial Developments.

Judicial consideration of this problem has been meager. Since the *Uebersee* case is again to be argued to this Court, we deem it unnecessary to comment on the developments in that case. The opinion of the Court of Appeals for the District of Columbia Circuit in the instant case indicates that the Court misconceived the basis for intervention. Suffice it to say that the *Uebersee* case and *Missouri-Kansas Pipe Line Co.* v. *U. S.*, 312 U. S. 502 (1941), among others, were completely ignored by the Court of Appeals and were not even cited. This is the first case in which this Court has decided to review the question of the treatment to be accorded to separable non-enemy interests in vested property of a neutral corporation having enemy stockholders.

While the *Uebersee* case was under consideration by this Court in 1947, the United States Court of Appeals for the Second Circuit in *Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (1947), did in fact sustain the principle of requiring the return of the non-enemy interests in vested property and of permitting retention of vested property to the extent of the enemy interest. Both plaintiff and defendant asked this Court to review that Court's judgment; and subsequent to the *Uebersee* opinion both requests were denied. 333 U. S. 873 (1948).

In that case, by agreements in 1939, I. G. Farbenindustrie conveyed to the Standard Oil Company of New Jersey its interests in a variety of assets in the United States which, up to that time, both companies had owned in intermingled fashion. These interests

included certain stock in subsidiary or affiliated companies, in addition to equitable interests in patents and contract rights. As a result of these purported conveyances, Standard Oil became the sole owner of legal title of all these assets which were subsequently vested by the Alien Property Custodian on the ground that Standard Oil was fronting for I. G. Farben and had not acquired any beneficial interest under the 1939 agreements. Executive Order No. 8785, Sec. 5E (iii), for some purposes of the Act defined a foreign national to include an American corporation "to the extent" that it "is or has been * * * acting or purporting to act directly or indirectly for the benefit of or on behalf of any national * * *" of a foreign country. 3 CFR, Cum. Supp. 1943; 6 F. R. 2897.[11] The Government contended that Standard Oil Company was a foreign national for the purposes of the Act; and that because it was a foreign national it was barred by Section 5(b) from bringing suit under Section 9(a). The theme of this argument was essentially the same as that which the Government unsuccessfully had urged upon this Court in the *Uebersee* case. Judge Clark noted with respect to this argument (163 F. 2d at p. 925, fn. 1):

> "Though defendant [the Government] does not make the argument, it would seem possible to contend that, under this extensive definition, plaintiffs became enemy nationals after the outbreak of war, since their concealment of I. G. assets continued thereafter. Such an argument

[11] Executive Order No. 8785 related to Foreign Funds Control (Appendix A, p. 60). The definition above quoted was subsequently incorporated in Executive Order No. 9193, Sec. 10(a), which relates to vesting by the Custodian. 3 CFR, Cum. Supp. 1943; 7 F. R. 5205.

would not require restricting the scope of § 9(a)." (Material in brackets supplied.)

The Court of Appeals rejected the contention of the Government, as applied both to the term "foreign national", and *a fortiori* to the term "enemy". It pointed out that, even under the "to the extent" definition of "foreign national", the Standard Oil Company was not barred from suit. It could still recover that portion of its vested assets which it had owned beneficially notwithstanding that the Custodian was entitled to retain the remainder which the Court found to be "substantially" or "equitably" that of I. G. Farben. The Court pointed out that the Congress in 1946 had refused the Custodian's request for legislation cutting off the right of a friendly foreign national to sue for return of his vested property under §9(a); it thereafter stated (p. 926):

"* * * The power of seizure and confiscation, particularly as against a friendly alien, is so drastic and so novel that we think it should not be extended beyond bounds clearly set. * * *

"But even if the defendant's general position be accepted, we think the second step of the argument presents difficulty in application beyond the general terms of the decree below. This premise would afford an added ground, a further buttress, for the refusal to return the property found below to be substantially and equitably that of I. G. But we do not see how it assists the defendant beyond this. Under the Executive definition of a foreign national, so far as here pertinent, it includes other persons only 'to the extent' that they acted directly or indirectly for the benefit or on behalf of a foreign national. Where plain-

tiffs were acting for themselves, as the District Court found with respect to the purchases before 1939, we find nothing in these provisions to bar the plaintiff from suit. Accordingly we conclude that application of the asserted principle would not change the final outcome of this action."

Silesian American Corporation v. *Clark*, 332 U. S. 469 (1947), which was cited by the Court of Appeals below, was decided at the same time as the *Uebersee* case. There, the Alien Property Custodian had vested certain shares on the books of Silesian American Corporation as belonging to an enemy. The corporation had refused to issue and deliver new certificates of stock to the Custodian. No assets of the corporation itself were vested. This Court held that the corporation was required to issue such new certificates, that the Custodian was entitled to their possession, and that it was not the obligation of the corporation to defend the right of the shareholders to be shareholders of the corporation.

Whether the shareholders, whose shares had been vested, or the Custodian would eventually establish rightful ownership of the stock in question was not in issue.[12] It was, thus, a controversy with which the corporation had no reason to concern itself. In the instant case, the plaintiff corporation is most directly concerned because its assets, not shares of its stock held by enemies, have been vested.

[12] The Government aptly described the significance to it of the *Silesian American Corporation* case in its brief to this Court in *Zittman* v. *McGrath*, 341 U. S. 446 (1951), as follows (p. 14, fn.):

"Where he vests a described *res*, the Custodian is clearly entitled to immediate possession."

It should especially be noted that in the *Silesian-American* case the Custodian's right to vest a substantial part of the stock allegedly owned by enemies did not induce him to attempt to vest all of the corporation's assets or its stock. We have been unable to find a single case of a domestic corporation substantially enemy owned or controlled where the Custodian sought even to vest the assets of any such corporation, or any separable non-enemy stock interest therein.[13] Accordingly, it may be fairly presumed that if I. G. Chemie, the plaintiff in this action, were a domestic corporation, the Custodian, regardless of the extent of enemy interest, would not have vested anything more than the enemy owned shares in the corporation. *Cf. Standard Oil Co., supra*; *Nagano* v. *McGrath* (October Term 1951, No. 169); Maurer, *Non-Enemy Interests in Enemy External Assets*, 16 Law & Contemp. Prob. 407, 422-30 (1951). The treatment sought to be accorded by the Government to non-enemy shareholders owning part of friendly alien corporations, as contrasted with the treatment given similar interests in domestic corporations, constitutes discrimination, which raises a serious constitutional question. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931).

It is recognized that, as a matter of administrative convenience and necessity, the Government may be

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[13] See Chapter 4, Annual Report, Office of Alien Property Custodian, for fiscal year ending June 1945. The Custodian vested *e. g.*, 535,000 shares, or 77%, of the outstanding stock of American Bosch Corporation; 479,726 shares, or approximately 91%, of the outstanding stock of American Potash Co.; 44,000 common shares and 2,225 preferred shares, or 100% and 41% respectively, of the outstanding common and preferred shares of Schering Corporation; 530,145 shares, or approximately 54%, of the outstanding shares of Hugo Stinnes Corporation; 382,700 shares, or approximately 61%, of the outstanding stock of Harvard Brewing Co.

obliged to vest the assets in the United States of a neutral corporation in order to reach the enemy interests therein, whereas, with respect to a domestic corporation, it is necessary to vest only the enemy owned stock. But administrative convenience and necessity for purposes of vesting do not afford a basis for the confiscation of that part of the vested assets which, in the case of a domestic corporation, the Custodian would not even have vested.

For the purposes of the Act, it will not be disputed that a Swiss corporation is no more an enemy than a domestic corporation and is equally entitled to the protection of the Fifth Amendment. We submit that the Custodian cannot justify his efforts to retain all of the assets of a Swiss corporation where, under the same circumstances, he would not do so in dealing with a domestic corporation. The right to retain the assets of a non-enemy corporation, whether the corporation be domestic or friendly alien, is limited to the extent of the enemy interests.

2. Executive and Legislative Developments.

The approach of the executive departments of the Government toward the basic issue in this case, during the period subsequent to the *Uebersee* decision, may be described as schizophrenic. They have consistently recognized the existence of the right which we urge, and at the same time they have exerted all their efforts to oppose the enforcement of the right, particularly as it applies to I. G. Chemie.

In 1947 the Government executed an international agreement, commonly called the "IARA" Agree-

ment,[14] which in effect adopts the very principle forming the basis of our claim. In this agreement, the Government has insisted that American interests receive the very treatment which we urge, with respect to assets vested by our allies, even though it now seeks to deny such treatment to American interests with respect to assets vested by the United States.

The article prefacing the text of the agreement expressed as one of its purposes:

> "The agreement, furthermore, will carry out the established policy of the Department of State of protecting the interests of United States nationals in assets outside Germany owned either by a corporation in which there is a German interest or by a corporation organized under the laws of Germany." 18 State Dept. Bull., p. 4 (1948).

Mr. Malcolm Mason, who participated in the negotiation of the agreement as Chief of the Legal Branch of the Office of Alien Property, wrote with respect to its purposes:

> "* * * There is precedent in the field of international private claims for refusing to look through the corporate entity. This view, however, is entirely out of keeping with the spirit and purpose of Trading With the Enemy Act

[14] This agreement, entitled "The Agreement Relating to the Resolution of Conflicting Claims to German External Assets", was negotiated in Brussels by our State Department and the Office of Alien Property and was signed on behalf of the United States on December 5, 1947, subject to necessary Congressional approval, 18 State Dept. Bull., pp. 6 *et seq.*; H. R. Rep. No. 2770, 81st Cong., 2d Sess., pp. 17 *et seq.* This agreement became effective February 1, 1951. 24 State Dept. Bull., p. 293 (1951).

legislation and of the Paris Agreement. It is essential, for these purposes, that indirect enemy interests be recognized. On the other hand, to treat the interest in the American corporation as wholly German enemy because it is indirectly German enemy-controlled does injury to the 20% non-enemy interest in the Netherlands corporation." 38 Georgetown Law Journal 171, 179-180 (January 1950).

In testifying concerning the agreement as late as July 12, 1950, Mr. Mason stated:

> "In any such agreement * * * we would eliminate German interests as thoroughly as possible. At the same time, we would protect, on a reciprocal basis, the right of Americans and non-enemies. Both of these have to be there." Hearings before the Subcommittee on Settlement of Intercustodial Conflicts Involving Enemy Property, Committee on Foreign Affairs, House of Representatives, on H. J. Res. 475, 81st Cong., 2d Sess., p. 15, July 12, 1950.

The language in the agreement, by which such a purpose is intended to be achieved, appears in Part III, Article 17, of the Annex. With interpolations as it would apply to this case, it reads:

> "It is contemplated that the proportion of the value of the property in the secondary country [U. S. A.] which corresponds to the percentage of the direct and indirect non-enemy interests in the primary company [I. G. Chemie] shall inure to the benefit of such non-enemy interests. In arrangements for release and reimbursement made under this Part between two or more

> Parties, the Parties shall make reasonable provision to avoid injury to interests in the primary company of non-enemies who are nationals of a third Party [Switzerland, Great Britain, France, etc.]" 18 State Dept. Bull., p. 10; H. R. Rep. No. 2770, op. cit. *supra*, p. 27, fn. 14 at p. 22. (Material in brackets supplied.).

In September 1950 the Congress passed H. J. Res. 516, which authorized the President to execute agreements, such as IARA, and in doing so specifically directed that:

> "(2) Such agreements shall be in accordance with the policy of protecting and making available for utilization the American and non-enemy interests in such property and further the elimination of enemy interests in such property and the efficient administration and liquidation of enemy property in the United States." Act of September 28, 1950, Public Law 857, 81st Cong., 2d Sess.

The House Report accompanying the legislation explained the need for the legislation in the following terms:

> "*It is believed that many of the provisions of the Brussels agreement and other contemplated agreements could be put into effect under existing law.* These agreements, however, involve a novel approach, designed to expedite administration and liquidation of enemy property by centralizing their administration in one country." H. Rep. No. 2770, op. cit. *supra*, p. 27, fn. 14 at p. 10. (Emphasis supplied.)

The Senate Report put it in these words:

> "These agreements will make it possible to substitute orderly administrative procedures and regulations as a means for settling intercustodial disputes for the more complicated, protracted, expensive and vexatious litigation that dominated this type of settlement after World War I." S. Rep. No. 2508, 81st Cong., 2d Sess., p. 1.

Both explanations make clear that it was not the purpose of the legislation to confer new rights upon or restrict existing rights available to non-enemies, but rather to provide an administrative means more expeditious, less complicated and less vexatious than litigation for the vindication of existing rights, backed by the full force of the legislative and foreign policy of the United States.

The President formally approved the right of return. While our motion for intervention was pending, the Congress passed a private bill (H. R. 8422, 81st Cong. 2d Sess.; see Appendix A, pp. 65-67), providing for return of thirty percent of the vested assets of a Honduran corporation. Thirty per c[redacted] of the stock was owned by a non-enemy minority stockholder. The President vetoed that bill, but in the course of his veto message of June 23, 1950 made it clear that in his judgment equity and justice require legislative action to provide administrative relief for non-enemy stockholders of neutral corporations, by general rather than by private legislation, in the following terms:

> "It is recognized that injustices may result from the statutory prohibition against return of property to persons who, even though they qualify

as individuals, are ineligible because their ownership of the vested property was through the medium of a corporation. This provision of law has required the Office of Alien Property to deny the return of property in other cases just as deserving as the one here in question. The special consideration this bill would grant to this particular claimant would be unfair to the other claimants in equally appealing circumstances.

"The problem presented by this case and other similar cases should be considered in connection with general legislation amending the Trading With the Enemy Act to permit returns of property to persons who would be eligible claimants if they had owned the property directly rather than through a corporate equity." H. Doc. No. 628, 81st Cong., 2d Sess., reprinted in S. Rep. No. 2051, 81st Cong., 2d Sess., p. 2. (See Appendix A, pp. 64-65.)

Following the suggestion of the President, legislation of general application was thereafter introduced and passed in the Senate on July 26, 1950 (S. 3901, 81st Cong. 2d Sess.). This bill (which, together with the Senate report thereon, S. Rep. No. 2051, appears in Appendix A, pp. 61-64), authorized administrative return of vested property upon the same principle which is the basis of your petitioners' claim for judicial relief in this case. Notwithstanding the President's message, the Department of Justice opposed the bill in hearings before the subcommittee of the House Committee on Interstate and Foreign Commerce, and it died with the end of the session.

The Department of Justice, while publicly opposing the bill, nevertheless announced in a prepared state-

ment delivered by Mr. Reis, then Acting Chief of the Legal Branch of the Office of Alien Property:

> "The veto message clearly expresses the President's desire to give relief to certain categories of stockholders. However, from the viewpoint of legislation the matter is extremely complicated and great care must be exercised in order to insure relief to the groups actually intended to be benefited and to avoid including among those benefited persons who we all agree are not entitled to relief. The legislation should also be drafted so as to avoid the creation of difficulties and confusion in administration. H. R. 8998 and S. 3901 are subject to such substantial objections in these respects that the Department must oppose their enactment, although *it is in favor of the general objectives of the President's veto message.*
>
> * * * * *
>
> "I wish to reiterate the statement that the Department of Justice is in favor of taking appropriate action to protect certain classes of non-enemy minority stockholders where it is reasonably possible to do so." Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce House of Representatives, 81st Cong., 2d Sess. on S. 3901, H. R. 8998, *etc.*, 401, at pp. 405, 409. (Emphasis supplied.)

The following reason given by the Department of Justice for its opposition to this bill is precisely one of the grounds which makes petitioners' intervention imperative:

> "Sixth, a special problem also is created by

S. 3901. In a number of cases, neutral corporations claimed ownership of important assets vested in the Attorney General. Rather than submitting to years of long-drawn-out litigation respecting some cases, they were settled for payment of cash to the claimant corporations. These settlements made it possible for the Department to make available to the war claims fund the amounts which will be, or have been, received from the sales of the stock immediately, rather than to await the disposition of very lengthy litigation. The important thing to notice here is that the claimant in each case was a neutral corporation, which settled the litigation and waived any claim to the vested property. *Under ordinary principles of corporation law, such settlements are, of course, binding on the stockholders who have no independent claim and the settlements assumed the applicability of this principle.*" Hearings, *etc.*, op. cit., *supra*, at p. 408. (Emphasis supplied.)

Several bills similar to S. 3901 have been introduced in the present Congress, both in the House and in the Senate and are pending in Committee.[15] The bill most recently introduced, S. 2339, was presented by Senator Magnuson on October 20, 1951. It provides

[15] H. R. 133, 82d Cong., 1st Sess., introduced by Mr. Keogh, and referred to the Committee on Interstate and Foreign Commerce January 3, 1951; H. R. 2263, 82d Cong., 1st Sess., introduced by Mr. McGuire and referred to the Committee on Interstate and Foreign Commerce January 31, 1951; H. R. 4284, 82d Cong., 1st Sess., introduced by Mr. Keogh and referred to the Committee on Interstate and Foreign Commerce May 28, 1951; S. 2339, 82d Cong., 1st Sess., introduced by Mr. Magnuson on October 20, 1951 and referred to the Committee on the Judiciary.

among other things that no claim for return may be made based upon an interest in a corporation

> "which has entered into a settlement of its claim for return of the property claimed, under the terms of which it has waived its interest in such property; * * *."

Presumably this provision was intended to meet the objection of the Government expressed through Mr. Reis with respect to the right of return where the corporation, having made the claim, has settled with the Government and has relinquished all rights in the vested property.

The principle we seek to establish in this case has been recognized, adopted and accepted by the executive and the legislative branches of our Government, but inexplicably has been denied to this case. The United States' delegation in executing the IARA agreement did so with a specific reservation that its provisions did not apply to the assets vested in the United States belonging to I. G. Chemie. In other words, the administrative machinery set up for the vindication of the rights of non-enemy stockholders in neutral corporations having enemy ownership is expressly denied to the non-enemy stockholders of I. G. Chemie, whether American, neutral, allied or persecutees.

Apart from the IARA agreement, the Government has failed to provide any administrative power of return of the American interest in assets of a neutral corporation vested by it. Yet our Government has successfully persuaded our Allies to provide in IARA for return of American stockholder interests in

neutral corporate assets vested by them, and has agreed to provide for the return of Allied stockholder interests in neutral corporate assets vested by it.[16]

The American (and neutral) stockholders in this situation are therefore left to the "vexatious litigation" under Section 9(a). To deny such judicial relief would produce this absurd result: an American stockholder in a neutral corporation, the assets of which were vested in both Canada and the United States, would be entitled to the proportionate return of the assets vested in Canada under IARA; but the same American stockholder would not be entitled to any return of the assets of the same corporation vested in the United States, even though a Canadian stockholder would be so entitled.

It is clear, therefore, that the various forms of administrative relief recently established by legislation and treaty were not intended by the Congress to be coterminous with the right to judicial return

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[16] *Cf.* Executive Agreement, commonly known as "Washington Accord of 1946" executed on May 25, 1946, between the British, French and American governments on the one part, and the Swiss government on the other. As provided in Article IV, B of the Annex thereto:

> "Appropriate measures will be taken to liquidate the interests in Switzerland which German nationals, resident in Germany, have through such organizations [enemy corporations] and equally to safeguard substantial interests of non-German persons which would otherwise be liquidated." 14 State Dept. Bull., p. 1121 (1946). (Material in brackets supplied.)

The zeal with which the Government has sought to protect non-enemy interests in property in Switzerland of enemy corporations is to be contrasted with its efforts to obstruct application of the same principle to assets of neutral corporations vested in the United States.

Implementation of the Washington Accord is still under discussion. See 20 State Dept. Bull., p. 819 (1949).

afforded by Section 9(a). *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C. 1949).[17]

3. Policy and Constitutional Considerations.

We have thus far been unable to find any official expression by our Government, either in the course of this case or elsewhere, as to what purposes or policies of the Act would be served by the confiscation of upwards of $50,000,000 in assets which represent the non-enemy interests. It is not difficult to understand the reasons why the Government should vest the stock of General Aniline & Film Corporation during the war upon the suspicion of substantial German ownership of its neutral parent. No other reason appears in its Answer in this case. It is understandable that the Government must confiscate, to the extent of enemy interests in vested assets, in order to

[17] The Court of Appeals for the District of Columbia Circuit there described the relationship of Sections 32(a) and 9(a) as follows (at p. 652):

> "True it is that mere presence within enemy territory of an enemy national during hostilities is usually a prohibitive factor against the *discretionary* power of return granted the President or his delegate by Section 32(a). However, a court is required to return under Section 9(a) if the claimant be not an 'enemy or ally of enemy'; . . . The two sections 9(a) and 32(a) are independent and exclusive of each other. The latter, we think, was added to serve the limited purpose of affording speedy administrative relief (when found by the Executive in the interest of the United States) to certain classes technically banned under Section 9(a), such as nationals of countries overrun by the enemy who remained loyal to the Allied Cause. Although, with certain exceptions, citizenship and presence within the territory of an enemy country bar relief under the discretionary Executive authority granted by Section 32(a), they, of themselves, do not bar recovery under Section 9(a). (Citing cases.) The provisions of that section, as concern the courts' jurisdiction, remain unaffected by Section 32(a)."

use such property as reparations as required by Congress under the War Claims Act (50 U. S. C. App. §2001ff). But no intent of Congress would be effected, and no purpose of the Act would be served by the confiscation of the non-enemy interest in vested assets. Official pronouncements have affirmed that view (*supra*, pp. 27-32).

Even in this case the Government has not suggested any policy to be served by a denial of a partial return. It merely claims it has no administrative machinery to make a partial return of vested property in accordance with the Act, and it refuses to recognize that the courts are able to provide relief under Section 9(a). In essence, the arguments of the Government are directed to procedure, not substance. See Maurer, op. cit. *supra*, p. 25, at p. 423.

It would be a serious matter if in fact the Act had by express provisions prevented procedurally the fulfillment of any of its substantive aims. If it had, constitutional questions would have been brought into issue here, for it is clear that friendly aliens are entitled to the protection of the Fifth Amendment, (see discussion pp. 25-6, *supra*); and it is equally clear that under the Fifth Amendment this Court has consistently disregarded form to reach substance. *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226, 235 (1897). There is, however, no provision in the Act to which the Government can point which expressly prevents the partial return of vested assets of neutral corporations when recovery is sought by suit or otherwise. It is the argument of the Government that these procedural handicaps must be read into the Act. It is inconceivable that the Court will read into the Act procedural hurdles to its

admitted purposes—hurdles which would also raise substantial constitutional questions. *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481 (1931).

The return of the vested assets to the extent of the non-enemy ownership in I. G. Chemie is also essential to vindicate the announced foreign policy of the United States. As the State Department in its comment upon the IARA Agreement made clear, one of the purposes of that agreement was to further the established policy of protecting the interests of United States nationals abroad, and analogous to our case, in the form of American investments in foreign corporations. If that established foreign policy was not of significant importance prior to the war, it has since the war assumed a position of utmost significance. The ECA and Mutual Security programs are intended to encourage private American investment abroad. How can such investment be encouraged when it may become the subject of ultimate confiscation, because by accident the investors may find themselves to be stockholders in common with prospective enemies in a future war—and worse, even though the investment be made in a non-belligerent country? Yet such would be the consequences of the position urged by the Government in this case. Hyde, *Protection by the United States of American-Owned Property in War Stricken Areas*, 46 Col. L. Rev. 519, 521-2 (1946).

Thus it appears to us that, if the Government is right that no present procedures exist for the partial return of the vested assets of neutral corporations in proportion to their non-enemy ownership, then it would be necessary to devise some. Whether the Government is correct in its position that no *admin-*

istrative procedures exist is not in issue in this case. However, in so far as the Government takes the position that a *court of equity* does not have the powers to bring about results which the Act requires, it is clearly wrong. Section 9(a) of the Act, which could not have been more broadly written to avoid any such procedural difficulties, together with the general equity powers of the Federal Court, serve to bring about the return of corporate vested property to the extent of the non-enemy interest in a fashion that will fully satisfy all the purposes of the Act. In subsequent portions of this brief, we suggest several established methods which a court of equity may utilize in this case to accomplish this result.

II.

The Right to Partial Return Is in the Corporation.

If, as we believe we have shown, there exists a right of partial return of vested property of a neutral corporation to the extent of its non-enemy ownership, we pass to the question of who should properly assert the right. In our view, it is the corporation.

Had the management of I. G. Chemie been acting in good faith, it would have asserted a claim for the partial return of its vested assets as an alternative to its claim for full return. But, because the corporate management apparently prefers to sacrifice the interests of the non-enemy stockholders rather than to submit to the possibility of close scrutiny of its holdings, it has refused to raise this issue and strenuously opposes our intervention.

Had the corporation presented this matter in its pleading, we doubt that any issue of proper claimant would have been raised. The non-enemy shareholders would thereby have been protected and the court could superintend such return to effectuate the purposes of the Act. The corporation's refusal to make the claim and its opposition to the assertion of the claim on its behalf by non-enemy shareholders require satisfactory explanation beyond mere objections based upon procedural difficulties.[18]

Until petitioners raised the issue of partial return in the District Court, it clearly was the view of the Government that the corporate entity was the proper claimant to assert the return of the vested assets. When petitioners filed an administrative application asking for their proportionate interest in the vested corporate assets, the Office of Alien Property rejected the application on the specific ground that the corporate entity was the only proper claimant. When your petitioners filed their action in the United States District Court for the Southern District of New York for the purpose of preserving their position against the possibility of the running of the statute of limitations, in view of the unsettled state of the law, the principal ground interposed by the Government in support of its motion to dismiss the complaint was that the proper claimant for the return of vested assets was the corporation. The Government has settled directly with neutral corporations a number of cases involving the matters here at issue, and did so on the acknowledged premise

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[18] Judge Laws, in *Uebersee Finanz-Korporation* v. *Clark*, 82 F. Supp. 602, 607 (D. C. 1949), pointed out several reasons why it is necessary to make such a claim in the pleading, *e. g.*, that such a claim might necessitate a different order and type of proof.

that the corporation was the proper claimant and that a settlement with the corporation bound all the stockholders of a corporation (see *supra*, p. 33).

In the present action, however, both the Government and the corporation have taken the position that, whatever right exists to a partial return of the vested property, that right can be exercised only by separate individual proceedings brought by each of the thousands of non-enemy stockholders. If respondents be right, then there would be required the filing of a multitude of individual suits, whose continuance might be made meaningless, if the court having jurisdiction of the property should adjudge either that the corporation obtain return of all the property or of none, or if a corporate settlement has been consummated. The facts require that the issues be presented now to the same court and in the same proceeding as that brought by the corporation, since that court has primary control over the vested property. We believe it clear that for proper judicial administration the rights we seek to have established require adjudication in the principal action, and that the corporation is the proper claimant.

So far as we have been able to determine, the only argument thus far advanced by the Government for its present position, that the proper claimant is not the corporation, is suggested in its brief in opposition to petition for certiorari in the pending case, *Uebersee Finanz-Korporation* v. *McGrath* (October Term, 1951, No. 178). There it said (at p. 27):

> "And to allow an enemy tainted corporation to secure even a partial recovery would plainly defeat the purposes of the act, for then the prop-

erty recovered would enure, in part, to the benefit of the enemy interests in the corporation."

The argument of the Government, however, erroneously assumes that a court of equity, decreeing a partial return of corporate assets, is powerless to prevent or limit the participation of enemy stockholders and corporate executives, wrongdoers in law or equity, in a corporate recovery. Equity courts, bankruptcy courts, and even administrative agencies, have had no substantial difficulty in dealing with similar problems in the past and in finding fair and equitable solutions for them. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483 (1919); *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307 (1939); *Pepper* v. *Litton,* 308 U. S. 295 (1939); *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194 (1947); *Backus* v. *Finkelstein,* 23 F. 2d 357 (D. Minn. 1927), app. dismissed, 31 F. 2d 1011 (C. C. A. 8, 1929); *Matthews* v. *Headley Chocolate Co.,* 130 Md. 523, 100 Atl. 645 (1917); *Brown* v. *DeYoung,* 167 Ill. 549, 47 N. E. 863 (1897).

The decree of a court might simply provide that the Government return to the corporate entity that portion of the vested assets proportionate to the ownership in I. G. Chemie proved to be non-enemy, upon condition that the corporation present to the court within a stated time a plan consonant with the purposes of the Act, for limiting the benefits of the recovery to the non-enemy interests in the corporation. We suspect that the ingenuity of the corporation would not be taxed in devising such a plan if the only alternative to the return of assets in excess of $50,000,000 were no return at all. A satisfactory plan might involve the creation of a preferred stock

or debentures issuable to the non-enemy stockholders to the extent of their interest in the recovered assets; or it might take the form of a liquidating dividend. If the corporation refused to submit such a plan, the shareholders could do so, or the court might then order distribution directly to the non-enemy shareholders. Surely the Government should be the first to favor a plan which would prevent the enemy from profiting by this litigation or any settlement thereof.

Another technical objection suggested is that the corporation might be placed under the burden of proving the enemy or non-enemy character of its shareholders. It appears to us that under the *Uebersee* case it has this burden in any event. For that matter, the burden would be no greater after intervention or under any other theory which might require separate 9(a) proceedings in every federal district court. Rather, much time, effort and expense would be saved by intervention. From the standpoint of the convenience of the parties and of the court, it is highly desirable to have all the proof of that nature adduced in one action rather than in a multitude of actions in different jurisdictions.

Any determination that the shareholders are the only claimants and that they are required to proceed, by separate individual judicial proceedings may have, in addition to the objections already stated, important and serious consequences. The Government, and perhaps the corporation in question, would be involved in as many separate litigations as there are eligible stockholders. A small shareholder, especially if he is a non-resident, would for very practical and economic reasons be deprived of any remedy.

But even more important in this case, substantially none of the other non-enemy stockholders of I. G. Chemie have taken any administrative steps to file claims as individual stockholders with the Office of Alien Property. They did not bring any separate Section 9(a) actions. Prior to the decision in the *Uebersee* case there was nothing in the case or in any order, notification or regulation which put them on notice to do so. After the *Uebersee* case, when the neutral corporation, I. G. Chemie, brought this action for return of all the assets, and there as well as beforehand proclaimed its non-enemy character, the non-enemy stockholders had reason to believe that the corporation would do whatever might be necessary to protect their interests.

If this Court should now determine that the claim to a partial return exists, but must be established in separate independent actions by each of the individual stockholders, such a determination might for all practical purposes be the equivalent of a determination that the claim does not exist. This is why the Government now urges so vigorously that the claim belongs only to the individual stockholders and must be asserted in independent separate actions. They argue that, because none of the stockholders except your petitioners either filed an administrative claim or initiated a separate Section 9(a) action, they are now barred by the statute of limitations set forth in Section 33 of the Act.

There can be no question that, if the corporation is the proper claimant, no issue as to limitations arises in this case. The corporation as an entity has protected all rights in the vested property in a timely

fashion in so far as the statute of limitations is concerned.

We believe that both respondents, the Government and the management of the plaintiff corporation, have a fiduciary relationship to the non-enemy stockholders of I. G. Chemie under the terms of the Act and of established principles of equity, and by their conduct are estopped to deny that the corporation is the proper claimant. *Cf. Branch Banking & Trust Co.* v. *United States*, 98 F. Supp. 757 (Ct. Cl. 1951).

In the particular circumstances of this case, we believe any other result would be abhorrent to a court of equity because the course of conduct recited above (pp. 7-8), was designed to prevent the non-enemy stockholders from protecting themselves heretofore in any other fashion. *Southern Pacific Co.* v. *Bogert*; *Taylor* v. *Standard Gas & Electric Co.*; *Pepper* v. *Litton*, all cited, *supra*, p. 42.

In *Pepper* v. *Litton* this Court affirmed the position of equity in relation to such activity (308 U. S. at p. 311):

> "He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position

for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

Accordingly, based upon the provisions and purposes of the Act, the Custodian's rulings, his practice and rationale in effecting settlements with corporate claimants, the convenience of the court and of the parties, and, finally and most important, the equitable considerations involved, the corporate entity is the proper party to assert the claim for the fractional return of vested assets to the extent of non-enemy ownership.

However, in considering whether intervention is essential to prevent an improper and illegal settlement, it is unnecessary to determine whether the corporation or the individual shareholder is the proper claimant. It will be remembered that a principal issue in this litigation, which is raised by the Government's answer, is whether I. G. Farben has any substantial stock interest held by or through the corporate officers and certain shareholders identified with them. If the Government desires to

compromise this issue with them, the non-enemy shareholders might not have the standing to object, if it were not to be at their expense. But the proposed settlement *would* inevitably be at their expense for two reasons—first, the proposed settlement, as we have alleged, and it has nowhere been contradicted, is for an amount far less than their *pro rata* interest in the vested assets (*supra,* p. 10); the second has already been stated to this Court by the Government when it pointed out that any return to the corporation (and this is equally applicable to return or payment in settlement) would defeat the purposes of the Act, because the recovery would inure to the benefit *pro rata* of all of its shareholders, enemy and non-enemy alike (*supra,* pp. 41-42).

Obviously the management has its personal reasons to cooperate with the Government in effecting such a settlement. It therefore refuses to litigate, and by every means seeks to prevent petitioners in their efforts to raise, the issue of the right of partial return to the extent of the non-enemy interest. Such a settlement would defeat the intent of the Congress as expressed in the Act and as reaffirmed in the War Claims Act. It is essential that a voice which is free to urge these considerations be heard in the litigation or in its settlement, without regard to whether the corporation or the shareholders is the proper claimant. That voice is thus far absent.

III.

The Right to Partial Return in This Case Can Be Asserted Only by Intervention.

If the claim exists for the partial return of the vested property, as we believe it does, and if the corporation is the proper claimant, as we believe it is, there is no way of asserting that claim in the present proceeding except by the intervention of your petitioners in the corporation's behalf.

We have alleged in our proposed complaint, and the corporate respondent has nowhere denied, that there are German shareholders of I. G. Chemie; that the management of I. G. Chemie, which itself holds a substantial stock interest in the company with voting control and which is itself charged with "enemy taint" in the principal action, has refused and continues to refuse to assert the claim because it has a personal and financial self-interest in precluding any adjudication of the issue. Clearly then, such a management will not and cannot properly discharge its fiduciary obligations to the corporation and to its non-enemy stockholders, *vis-á-vis* the Trading With the Enemy Act. In such circumstances, the case is in a posture which requires the intervention of stockholders on behalf of the corporation under Rule 24(a)(2), F. R. C. P., which in effect provides for intervention as a matter of right by an applicant when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. *Missouri-Kansas Pipe Line Co.* v. *U. S.*, 312 U. S. 502 (1941);

Pyle-National Co. v. *Amos*, 172 F. 2d 425 (C. A. 7, 1949); *Park & Tilford, Inc.* v. *Schulte*, 160 F. 2d 984 (C. C. A. 2, 1947); *cf.* Note, *Shareholder Intervention in Corporate Litigation*, 63 Harvard L. Rev. 1426, 1429 (1950).

If, on the other hand, it should ultimately be held that the proper claimants for the fractional return of the vested assets are the non-enemy stockholders as a class, intervention is equally essential to protect the assertion of the claim, because such a determination is in effect a decision that the non-enemy stockholders under the Act have a direct interest in the vested assets which would be adversely affected by any disposition of the funds made by the court in the principal action. The right to intervene on such a basis is specifically provided for by Rule 24(a)(3), F. R. C. P.

But there is in this case another urgent reason for intervention by and on behalf of the non-enemy stockholders: to protect the interests of the non-enemy stockholders against settlement of the litigation, which respondents are now endeavoring to consummate.

The Government proposes to return to the corporation an amount far less than the value of the non-enemy interests in the vested assets and yet to permit enemy participation in the recovery. Thus the injury to the non-enemy interests is compounded. Having received less than their due under the settlement, the non-enemy interests are compelled to share the inadequate recovery with the enemy shareholders. In this way the recovery ultimately reaching the non-enemy

interests directly or indirectly is further diluted while at the same time a class of interests specifically declared to be ineligible for any recovery under the Enemy Act is unjustly enriched.

Such a settlement is improvident, and is illegal under the terms of the Act. The Government apparently agrees with our premises, but says, that once the Department of Justice is in litigation the Department has the unlimited power to settle any litigation, in effect without regard to the purposes and intent of the Act. We believe this position is wrong, particularly where the interests most directly and adversely affected by the settlement are not parties to it. We believe further that this Court has already enunciated this principle in the *Missouri-Kansas Pipe Line* case (*supra*, p. 48), where the Government had taken a similar position:

> "But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion."

In our view, under the provisions of Rule 24(a)(2) and (3) and the doctrine announced by this Court in the *Missouri-Kansas Pipe Line* case, your petitioners on behalf of all the non-enemy stockholders of I. G. Chemie similarly situated have the right to intervene.

CONCLUSION.

The Judgment of the Court Below Should Be Reversed.

Respectfully submitted,

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APPENDIX A.

Trading With the Enemy Act, as Amended.

SEC. 2. That the word "enemy;" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any politi-

cal or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SEC. 5. (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath,

in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be

fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided,* That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided further,* That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

SEC. 7. (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy

or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom

and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then

such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Executive Order No. 8785 of June 14, 1941.

SEC. 5. E. The term "national" shall include,

. . . . . .

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

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Executive Order No. 9095 of March 11, 1942,

SEC. 10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary, and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended: *Provided, however,* That persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an

enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended.

S. 3901, 81st Congress, 2d Session.

IN THE HOUSE OF REPRESENTATIVES

July 27, 1950

Referred to the Committee on Interstate and Foreign Commerce

AN ACT

Amending section 34 of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 34 of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, is hereby further amended by adding at the end thereof the following subsection:

"(j) If the property or interest vested in or transferred to the Alien Property Custodian was owned, either directly or beneficially, immediately prior to such vesting or transfer, by an ineligible corporation, or other business association, then after final disposition of the debt claims described in subsection (g) hereof the Custodian shall pay out of the remaining balance, if any, of the money from which in accordance with subsection (d) hereof payment of debt claims may be made, claims based on ownership by eligible owners of less than all of the common or preferred stock of

such ineligible corporation or of less than the entire proprietary and beneficial interest in such ineligible association. For the purpose of this section a claim based on such ownership shall be treated as a debt claim, except that the time for filing such claim shall expire two years from the date of the last vesting in or transfer to the Custodian of any property or interest of an ineligible corporation or association in which there is such ownership, or from the date of the enactment of this subsection, whichever is later.

"Such remaining balance shall be equitably applied by the Custodian to such claims of eligible owners taking into consideration the nature, preferred or common, of the claim of each such owner. The amounts payable on such claims shall be based on the proportionate stock or proprietary and beneficial interest of each eligible owner and in the case of an eligible owner of common or capital stock or an interest in the nature thereof shall equal that proportion of the vested assets remaining after taking into account claims otherwise payable under this Act (including claims of creditors otherwise payable under this section and claims of a preferred nature of eligible owners payable under this subsection) which corresponds to such owners' proportionate common or capital stock interest or proprietary and beneficial interest in the nature thereof in such corporation or association: *Provided, however,* That this subsection shall not be deemed to require payment of any claim otherwise payable pursuant to any international agreement.

"For the purpose of this subsection 'ineligible corporation or association' means a corporation or association which is determined to be ineligible for return of vested property pursuant to section 32 of this Act, and 'eligible owner' means the owner of any part of the stock of an ineligible corporation or of any part of the proprietary and beneficial interest in an ineligible association, or the legal representative or successor in interest by inheritance, devise, bequest, or operation of law of such owner, if such ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of payment pursuant to this subsection (without regard to purported divestments or limitations of such ownership by the Government of Germany, Japan, Bulgaria, Hungary, or Rumania), and if such owner and his legal representative or successor in interest, if any, are persons,

corporations, or associations determined to be eligible for return of vested property under section 32 of this Act."

Passed the Senate July 26 (legislative day, July 20), 1950.

Attest: LESLIE L. BIFFLE,
Secretary.

Senate Report No. 2051, 81st Congress, 2d Session.

AMENDING SECTION 34 OF THE TRADING WITH THE ENEMY ACT

July 17 (legislative day, July 1), 1950—Ordered to be printed

Mr. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 3901]

The Committee on the Judiciary, to whom was referred the bill (S. 3901) amending section 34 of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, having considered the same, report favorably thereon, without amendment, and recommend that the bill do pass.

STATEMENT

The purpose of the proposed legislation is to correct an inequity now present in existing law. In view of the President's remarks in his veto message on H. R. 8422 (H. Doc. No. 628), it is the opinion of the committee that the present measure will bear the favorable endorsement of the Department of Justice (Alien Property Custodian) and the President. H. R. 8422 was a private bill designed to correct an injustice to a single individual, which injustice was the result of the inequity in existing law referred to above and explained in the following paragraphs. The President in his veto message, which readily admitted that the inequity existed, nevertheless stated (and in fact specifically asked) that the matter should be attended to by general legislation affording relief to all those similarly situated.

The proposed bill has been carefully drafted to meet the requirements as asked by the Executive.

Under existing law, there is a statutory prohibition against the return of property to persons who, even though they qualify as individuals, are ineligible because their ownership of the vested property was through the medium of a corporation. Thus, for instance, an enemy alien whose property has been vested directly by the Alien Property Custodian can secure return of such property upon qualifying under the law as a persecutee. However, the same person is barred from recovery by law if such vested property happens to consist of a minority interest in a vested corporation. The inequity, in the form of an unwarranted discrimination, is obvious.

Attached hereto and made a part thereof is the veto message of the President, wherein this general legislation is advised and requested.

To the House of Representatives:

I return herewith, without my approval, the enrolled bill (H. R. 8422) for the relief of Carmencita von Plettenberg.

The bill directs the transfer to Countess Carmencita von Plettenberg of 30.77 percent of the property vested by Vesting Order 10744 as the property of Casa Konke S. A. and La Talleres Tipo-Litograficos Ariston (Imprenta Ariston), business enterprises organized under the laws of Honduras.

It appears that Countess Carmencita von Plettenberg acquired an interest in these Honduran enterprises by inheritance from her father, a German citizen. The remaining interest in the enterprises was held by German citizens resident in Germany. Although Countess von Plettenberg was a German citizen, resident in Germany during the war, she would be eligible under section 32 (a) of the Trading With the Enemy Act for return of any property formerly owned by her if she were shown to be a victim of religious or political persecution. But, while it appears that she was a victim of persecution by the Nazis, the property which she claims was owned by corporations in which she was a minority shareholder. Her minority share of the vested assets of the corporations in question cannot be returned under the law as it now exists because more than 50 percent of the stock was owned by persons who are ineligible under the statute for the return of the vested property.

It is recognized that injustices may result from the statutory prohibition against return of property to persons who, even though they qualify as individuals, are ineligible because their ownership of the vested property was through the medium of a corporation. This provision of law has required the Office of Alien Property to deny the return of property in other cases just as deserving as the one here in question. The special consideration this bill would grant to this particular claimant would be unfair to the other claimants in equally appealing circumstances.

The problem presented by this case and other similar cases should be considered in connection with general legislation amending the Trading With the Enemy Act to permit returns of property to persons who would be eligible claimants if they had owned the property directly rather than through a corporate equity. I hope that the Congress, with the assistance of the executive agencies concerned, will develop and enact appropriate legislation at an early date.

While the particular facts in this case warrant sympathetic consideration, I am constrained, for the foregoing reasons, to withhold my approval from the bill.

HARRY S. TRUMAN.

The White House, June 23, 1950.

H. R. 8422

EIGHTY-FIRST CONGRESS OF THE UNITED STATES OF AMERICA, AT THE SECOND SESSION, BEGUN AND HELD AT THE CITY OF WASHINGTON ON TUESDAY, THE THIRD DAY OF JANUARY, ONE THOUSAND NINE HUNDRED AND FIFTY

AN ACT For the relief of Carmencita von Plettenberg.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, or the officer or agency designated by him, pursuant to the provisions of section 32 of the Trading With the Enemy Act (U. S. C., title 50, App., sec. 32), shall transfer and deliver 30.77 per centum of the property hereinafter described to Carmencita von Plettenberg (also

known as Minita von Plettenberg) or her successors in interest. The property heretofore referred to is all of the property and interests vested in or transferred to the Attorney General as the property of Casa Konke S. A., a corporation, and as the property of La Talleres Tipo-Litograficos Ariston (Imprenta Ariston), remaining after the deduction of the amount expended or incurred by the United States, prior to the transfers provided by this Act, for the conservation, preservation, or maintenance of such property and interests and for the payment of debts lawfully payable out of such property and interests. The term "successor in interest" shall mean the legal representative (whether or not appointed by a court in the United States), or a person succeeding by inheritance, devise, bequest, or operation of law, to any part of the stock or other beneficial ownership by Carmencita von Plettenberg of the corporation, property, and interests referred to above.

SEC. 2. The property and interests to be transferred as provided by this Act shall be subject to attachment, in accordance with the provisions of section 32 (f) of the Trading With the Enemy Act, in the same manner as property of (1) the person to whom return is to be made and (2) the person who owned such property or interests immediately prior to its vesting or transfer to the Alien Property Custodian; but not more than 30.77 per centum of any obligation of such owner prior to vesting shall be satisfied out of such property and interests. Upon delivery of property to a transferee under this Act, such transferee shall succeed to 30.77 per centum of each obligation lawfully assertible by a person not ineligible to receive a return under section 32 of the Trading With the Enemy Act against the corporation, property, or interests referred to above, except that such transferee shall not succeed to obligations exceeding in aggregate amount the value of the property and interests transferred to such transferee under the provisions of this Act.

SEC. 3. Not more than 10 per centum in value of the proceeds of the transfers provided for by this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with the transfers provided for by this Act, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this section shall be

deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

SAM RAYBURN,
Speaker of the House of Representatives.

ALBEN W. BARKLEY,
Vice President of the United States and President of the Senate.

[Endorsement on back of bill.]

I certify that this Act originated in the House of Representatives.

RALPH R. ROBERTS, *Clerk.*

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows:

[The text of Section 34 follows.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 172

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents.*

REPLY BRIEF FOR THE PETITIONERS.

WILLIAM RADNER,
IRVING MOSKOVITZ,
HENRY G. FISCHER,
SEYMOUR GRAUBARD,
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Attorneys for Petitioners.

PETER N. SCHILLER,
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REPLY BRIEF FOR THE PETITIONERS.

I.

The Right to a Partial Return of Vested Assets.

Notwithstanding petitioners' repeated challenge both to the plaintiff corporation and to the Government to treat on the merits the issue of whether a right to partial return exists, we submit that in the main they have failed to do so.

Neither respondent has seriously challenged petitioners' analysis of the Act and of the *Uebersee* case (Petitioner's

Brief, pp. 17-20). Neither respondent has questioned petitioners' exposition of the judicial, legislative and executive developments subsequent to the *Uebersee* case (pp. 26-36) and of the policy and constitutional considerations involved (pp. 36-39). Neither respondent offers any constructive alternatives.

The Government's brief in its entirety relies upon the premise that petitioners' intervention is to compel the plaintiff corporation to assert a claim personal to the non-enemy stockholders. The Government presumes without any basis in fact or in law that if enemy shareholders are ineligible to participate in a recovery by the plaintiff corporation and if such recovery would thus redound to the benefit of the non-enemy shareholders, the claim becomes a claim of the shareholders, ergo, a claim personal to them, but one which they do not have the standing to raise in this case because shareholders as such have no interest in the property of their corporation.

This we submit is the sum and substance of the argument of both respondents. They have thereby avoided frank consideration as to whether, notwithstanding a substantial enemy interest in the plaintiff corporation, there nonetheless exists a right of partial return to the corporation itself of its vested assets. To say that petitioners are seeking to enforce their individual right does not make it so. As was pointed out in petitioners' brief (pp. 41-43), a court of equity, in administering a corporate recovery [a Section 9(a) action is by definition an action in equity], has the power to control its disposition so that the interests of wrongdoers, whether they be stockholders or directors or third parties, are either eliminated or subordinated. If the corporation, as in this case, should be unable to recover all of its property because certain of its shareholders and officers should be found to be enemy or enemy tainted, these established principles of equity as well as the Act itself require that the corporate recovery whether by judgment or settlement shall not inure to their benefit.

The plaintiff corporation in effect concedes the validity of these principles but argues weakly that they constitute an exception to the general rules governing corporate recoveries. (Pltf's. Br., p. 8) The Government ignores them completely since it has chosen to base its entire brief on the premise that if all of the stockholders do not participate in a corporate recovery, the claim is to be considered *ab initio* as an individual claim rather than as a corporate claim. But as appears in cases which we have cited in our main brief (p. 42), a corporate claim in which all are not eligible to benefit remains nonetheless a corporate claim.

As a matter of fact, if the Government is correct that any claim for *partial* return is personal to the stockholders, by what right does the Government purport to effect any settlement whatsoever with the corporate entity for a *partial* return *to* the corporation, especially upon the terms alleged by your petitioners, nowhere denied by either of the respondents, terms which the Government in the *Uebersee* case has stated to be contrary to the provisions of the Act. Recognizing this inconsistency, the Government asserts that the stockholders will be bound only *pro tanto*, and that they continue to retain individual claims, *pro tanto*. In making this argument as a desperate expediency, the Government would willingly sacrifice its own established principles relating to settlements of corporate actions so that henceforth, no settlement with a corporation can effectively dispose of a claim in controversy unless all of the stockholders consent.

There remains unchallenged the simple fact that the property *of* the corporation was vested *from* the corporation and, since, as the Government argues, a stockholder has no interest in the corporate property, it is to the corporation that return of its property must be made whether it be all or part.

As we have stated above, we do not find in the Government's brief any serious effort to argue against return to the corporation upon its own claim, except perhaps indirectly in two sentences on page 24 of its brief: "We sub-

mit there is equal ground for vesting and retaining the property of corporations which are enemy tainted for whatever reason, whether it be that they are incorporated in Germany, that they do business there, or that they are controlled by the enemy in fact or by virtue of 50% enemy stock ownership." As a footnote thereto, the Government states: "It is a valid inference that 50% of stockholders in a corporation exercise control." The Government cites no authority for this argument nor does it even attempt to demonstrate its relationship to the facts of this case. Moreover, one might infer from the quoted text that the Government is willing to abandon any claim on its part for retention of any part of the property of the plaintiff corporation if less than 50 percent of its stock is owned by enemies, or even if more than 50 percent of its stock is owned by enemies where the inference of enemy control is rebutted. As for its policy argument, it asserts only that investors must accept the consequences of losses by the corporation (p. 25). Yet the Government, in this context, does not deny that it has never vested the assets of an American corporation whose stock is majority owned *and* controlled by enemies. Even in a case where over 90% of the stock was enemy owned and controlled, the remaining 10% has been left untouched. (Petitioner's Brief, p. 25, n. 13.)

The Government tangentially relies at this point on the prize law cases and Section 32 of the Act, but *only* to support the proposition that stockholders do not have an interest in corporate property vested as that of an enemy—again no mention or any consideration of the main proposition whether the corporation itself has an interest in vested corporate property. With respect to the prize law cases and the foreign cases which the Government cites, we think it enough to observe that these cases had already been decided and rejected when it was clearly the law under the Act that a neutral corporation was entitled to a return of all of its vested assets even though it may have been wholly enemy owned. *Hamburg-American Line Terminal & Navigation Co.* v. *United States*, 277 U. S. 138, 140 (1928). The Government nowhere shows why such cases which were in-

applicable to the Act prior to 1941 suddenly became the basis for interpreting the Act after amendment to Section 5(b). Insofar as the reference to prize law may be an inarticulate attempt to meet the constitutional considerations involved in this case, we need point out only that the express constitutional provisions concerning prizes are nowhere here involved.

The Government then refers to Section 32 as "clarification of the proposition, relevant here, that nonenemy stockholders can have no rights in vested corporate assets." Again no mention of the corporate claim. The Government attempts to infer from Section 32 that this section lays bare the whole Congressional intent with respect to return of all vested property. On the contrary, as petitioners have pointed out (Br., pp. 35-36), Section 32 deals only with the circumstances in which the Custodian, in his discretion, may make a voluntary return of vested assets without requiring the claimant to resort to the judicial process under Section 9(a). It will be remembered that one of the grounds upon which the Custodian may refuse a return under Section 32 is that such a return is not "in the interest of the United States." Indeed, it was on that ground and upon *no* other that the Custodian refused to make administrative return of the vested property to this plaintiff corporation. Further any action or non-action on the part of the Custodian under Section 32 is entirely within his discretion and is not subject to judicial review. The impression which the Government apparently is seeking to create, that such a discretionary process on the part of the Custodian is coterminous with or a substitution for the right of judicial return afforded by Section 9(a), is clearly erroneous. *McGrath* v. *Zander*, 177 F. 649 (C. A. D. C. 1949).

The Government then refers specifically to Section 32(a)(2)(E) as supporting its position. That subsection provides that the Custodian may in his discretion return *all* of the vested property of a foreign corporation in a case where less than 50 percent of the stock is owned by enemies and where the corporation is not controlled by enemies. Be it

noted that such a return makes whole all of the stockholders in such a corporation so that the benefits derived therefrom by the enemy shareholders do not diminish the interests of the non-enemy shareholders. The Government seeks to draw the inference that the "50 percent rule of Section 32(a)(2)(E)" may perhaps be regarded as a legislative view of one of the questions stated in *Uebersee* (even though it was enacted prior to the decision) as to the extent of holdings necessary to constitute enemy taint. The Government in substance is asking this Court to assume that Congress intended that in any case in which the Custodian in his absolute discretion decides not to make whole the enemy and non-enemy alike, a neutral corporation cannot have returned to it any of its assets however substantial the non-enemy ownership. We submit that the Act does not require and the Congress never intended that a neutral corporation with substantial, perhaps majority, non-enemy ownership depend upon the largesse of the Custodian, without any right of judicial review.

The brief of respondent plaintiff corporation makes no pretense of any serious discussion on the merits as to its own right to a partial return, except to say that it cannot, and even if it could, it will not make such claim. Only if petitioners are permitted to intervene will this claim ever be asserted.

II.

The Illegality of the Settlement.

It is in connection with the settlement of the principal action that the briefs of the respondents show the tragic weakness of the position which they seek to maintain. Neither brief challenges the factual statements made by the petitioners in their pleadings and in their brief concerning the imminence, the terms and nature of the proposed settlement. Your petitioners have stated that the proposed settlement is for an amount far less than the proportionate interests of the corporation's non-enemy stockholders in the vested assets. This has not been challenged. Your

petitioners have alleged that the plaintiff corporation and the Government intend that the proceeds of the settlement shall inure alike to enemy and non-enemy interests in the corporation. This has nowhere been denied. Your petitioners have taken the view that such a settlement is contrary to the Trading With The Enemy Act and therefore illegal, and that the management of the corporation is seeking such a settlement because of its personal and financial self-interest. The Government weakly attempts to meet the petitioners' argument on the illegality of the settlement. The corporation ignores it but takes refuge in the fact that petitioners have not cried "fraud". The terms and nature of the settlement speak for themselves.

As we pointed out in our main brief, the Government itself has taken the position in the *Uebersee* case, now pending before this Court, that a partial return to a foreign corporation, inuring alike to enemy and non-enemy stockholders, would be contrary to the Act and illegal. In its brief in this case the Government attempts to uphold the legality of the proposed settlement upon two grounds: (1) that a settlement in which a partial return is made to a corporation inuring to enemy and non-enemy alike is not such a partial return, and (2) that, if such a settlement is a partial return, then it is wrong in the *Uebersee* case and right here because of the provisions of Section 32 (a) (2) (E). As we have already pointed out, that section permits the Custodian in his discretion to return *all* the vested assets to a foreign corporation having enemy and non-enemy interests. The Government does not explain how it can use this provision as a justification for a "partial return" where whatever the enemy interests receive is at the expense of the American and friendly alien interests, a result as inconsistent with the purposes of the Act as can be imagined.

Conclusion.

The Government's brief assumes, and the plaintiff corporation's brief concedes (p. 7) that if it be determined that the right to a partial return of corporate property is in the corporation, and is not a right which is personal to the stockholders, petitioners must be permitted to intervene to assert that right on behalf of the corporation. The respondents' characterization of the claim here made by petitioners as one personal to them but in the name of the corporation, is but an elaborate strawman. The claim asserted by petitioners is on behalf of the corporation and is a corporate claim. That enemies under the Act may be ineligible to participate in a corporate recovery, in furtherance of the purposes of the Act, does not affect the character of the claim nor the identity of the claimant. In any event, petitioners have the standing to intervene if for no other reason than to prevent an improvident settlement which the respondents are about to make in diminution of the rights of the non-enemy shareholders and in a manner which is illegal and contrary to the purposes of the Act.

Respectfully submitted,

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OCTOBER TERM 1951.

No. 172.

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents*.

BRIEF FOR RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. etc. IN OPPOSITION.

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BRIEF FOR RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. etc. IN OPPOSITION.

QUESTION PRESENTED.

Whether this Court should review a decision of the Court of Appeals denying, because of the inapplicability of Rule 24(a) (2) and (3) of the Federal Rules of Civil Procedure, leave to two stockholders of a Swiss corporation to intervene under that Rule, derivatively, individually and for a non-existent class, in the corporation's statutory action

against the Alien Property Custodian pending in the District of Columbia and filed under Section 9(a) of the Trading with the Enemy Act to recover its vested corporate property upon the ground that it is neither enemy nor enemy-tainted, where the applicants claim that certain hypothetical phrases in the opinion of this Court in *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, permit them to recover *individually*, if they are "non-enemy," a portion of the vested corporate property commensurate with their stock interest in the corporation, and also to block a compromise between the corporation and the United States which does not allow for such alleged right;—that is to say, whether this Court should review the decision in question, in view of the fact that the Court of Appeals is clearly correct according to all standards, and, in any event, in view of the fact that these two stockholders are prosecuting their own action in New York under Section 9(a) against the Alien Property Custodian in which they assert the same claim in their individual behalf and squarely present there the "issue" which they draw, *albeit incorrectly*, from the *Uebersee* case, not interlaced with other inapplicable theories such as class actions and stockholders' derivative procedures, and by which New York action they protect themselves, if they have individual rights, against the possibility of a compromise impairing such a right.

STATEMENT.

At the end of this Court's opinion in the case of *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 appears the following paragraph:

> "It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally

of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification."

Petitioners, claiming to be "non-enemy" or "non-enemy-tainted" stockholders of the respondent-corporation, and further claiming to represent a class of such stockholders, assert that, by virtue of the foregoing language of this Court, they can recover a portion of the vested property of this respondent equal to their stock interest, even if the respondent-corporation may be denied recovery of *all* such property.

Petitioners seek to intervene in the suit which this respondent is maintaining in the District Court under Section 9(a) of the Trading with the Enemy Act to recover its vested property, their theories of intervention being as follows:

(1) That under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and under the case of *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, they may intervene "derivatively" to assert their alleged proportional claim;

(2) That under Rule 24(a)(3) they may intervene directly—that is, as individuals—to assert such claim, upon the ground that they have such an "interest" in the vested corporate property; and

(3) That there is a "class" of "non-enemy" stockholders, and petitioners represent them in the attempted intervention.

The Court of Appeals held that petitioners did not come within either clause of Rule 24(a), and affirmed the District Court's denial of intervention.

This respondent submits that the *Uebersee* case does not support petitioners' theory, but if it does, petitioners have an individual action pending in New York under Section 9(a) and therefore intervention here should not be allowed.

This respondent reads the foregoing language from the *Uebersee* case as not considering the problem of "enemy taint" from the viewpoint of the "rights" of individual stockholders of a corporation, but, instead, of dealing with the following question: where a corporation is only "tainted," instead of being enemy-owned or enemy-controlled, how *small* or how *indirect* may the "taint" be in order to permit the Custodian to retain some or all of the vested corporate property? In other words, we interpret the questions of this Court as touching upon an entirely different matter from that to which petitioners refer.

But, assuming that this respondent's idea is erroneous, and that this Court had in mind the protection of so-called "innocent" stockholders, we submit that, for two reasons, the instant case is not the one in which review of the question should be had by this Court. One reason is that petitioners' "individual" action in New York squarely presents their point of view; and the other is that *on the record* which petitioners present to this Court, there is no basis to invoke what they call the "Uebersee issue."

As to the former of these two reasons, the Court's attention is called to the following facts:

On March 9, 1950, five days before the original motion was filed in the trial court for leave to intervene, these same petitioners instituted in their own individual behalf, in the United States District Court for the Southern District of New York, a civil action under Section 9(a) against the Attorney General as successor to the Alien Property Custodian, seeking a decree adjudging that they are entitled to the ownership, possession and enjoyment of their pro-

portionate share of the property and funds of this respondent seized by the Alien Property Custodian. (R. 85-88) The defendant therein moved to dismiss such action upon the ground that it failed to state a claim upon which relief could be granted. Judge Samuel Kaufman denied this motion, and the case has been calendared for trial upon the Custodian's answer.

As to the latter of the foregoing two reasons, we refer to the fact that on pages 4 and 5 of their petition, petitioners embrace and rely upon arithmetic—whether correct or not is, at this moment, unimportant—to the effect that this respondent's management—charged by the Custodian with "enemy taint"—owns or controls 39% of the voting stock and that an additional 11% were owned by German nationals. Surely, such 50% are more than "only a fractional enemy ownership" as that phrase is used in the clause: "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears." Instead, it seems that the phrase, "only a fractional enemy ownership," is in apposition to the words "negligible stock interest" appearing earlier in the same paragraph. The result is that petitioners are not presenting a case which even sympathetically involves the most favorable interpretation of the "Uebersee issue."

A word about the so-called "class action." Petitioners use the phrase "non-enemy stockholders" as descriptive of a class, just as one might describe by class "common stockholders" or "preferred stockholders." There is, of course, no such class, and if the test ever comes, each shareholder would have the burden of proving that under Section 9(a) of the Trading with the Enemy Act, he is not an enemy nor "enemy tainted." In other words, a so-called class of non-enemy stockholders could not establish their status as a unit, such as holders of common or preferred shares may do; but, instead, each shareholder would be, in effect, a separate plaintiff, in a separate Section 9(a) proceeding. Under petitioners' theory, this case would be

converted from one where the "enemy" status of this corporation is in issue, to hundreds or thousands of individual actions, in each of which the "enemy" or "enemy tainted" status of the plaintiff-stockholder would be the issue.[1]

ARGUMENT.

Introductory.

This respondent submits that a fundamental weakness of petitioners' position is that they are really asserting individual claims,—not a corporate one. Their contention—that the corporation may recover for the benefit and to the extent of the non-enemy stockholders—"covers a multitude of sins" and is quite self-serving as applied in this instance. It provides an *otherwise qualified* plaintiff under a Section 9(a) action. It *appears* to fit one or more categories of stockholders' derivative actions. And it overcomes all the difficulties, confronting other shareholders in their alleged class, which arise out of the statutory limitations relating to the filing of claims and suits.

If it should eventually be decided that "non-enemy" stockholders have proportional rights in the vested property of their corporation, such rights must be individual to the stockholders and not corporate. The assertion of such rights would be contingent upon the failure of the corporation to recover if it should be determined that it is "enemy" or "enemy-tainted." At such point the corporation would have lost all right, title and interest in the vested property. Moveover, the corporation will not acquire anything if petitioners' claim prevails.

In other words, according to petitioners, the corporation might not recover in its own right, but could recover in the right and to the proportional extent of its "non-enemy" stockholders for the sole benefit of such stockholders. It would be a sort of "use" plaintiff for them. But it is submitted that if the "non-enemy" shareholders have

[1] This respondent has approximately 3000 stockholders.

rights in the vested property, they may be enforced by direct action on their individual behalf. Anything else is sheer circuity the ultimate objective of which is to give "eligible" stockholders what they are really claiming, namely, a direct right in vested property of an "ineligible" corporation.

Rule 17(a) of the Federal Rules of Civil Procedure provides that every action shall be prosecuted in the name of the real party in interest. Surely, the real parties in interest would be the so-called "non-enemy" stockholders. The corporation would have lost its rights in the vested property and, under such circumstances, it would plainly not be an indispensable party—nor even a necessary one.[2]

I.

Petitioners Have No Basis For Intervention.

The opinion of the Court of Appeals was confined to this point.[3]

Petitioners rely upon clauses (2) and (3) of Rule 24(a) of the Federal Rules of Civil Procedure, as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

Petitioners wish to intervene "derivatively" under clause (2) of the Rule, and directly or "individually" under clause (3).

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2 See petitioners' Complaint filed in New York, (R. 85-88).

3 Record, pp. 79-80.

As to Rule 24(a)(2), we submit that petitioners are not and may not be bound by a judgment in the main action. This is what the Court of Appeals held, stating:

> "If they have a right to a share of the vested property they cannot be deprived of it in a suit to which they are not parties."

This is the provision of the Rule under which intervention ordinarily is allowed to a stockholder of a corporation.[4] The reason is very simple. The right which is being asserted in such cases is a corporate right, and the stockholder seeks intervention either to assert or to support such a right. Naturally, in those circumstances, intervention is the only opportunity afforded the shareholder to litigate the point which he seeks to maintain. If he permits the chance to pass, he is thereafter estopped.

But that is not the situtation here. The main complaint seeks recovery for the corporation as a whole. Petitioners do not ask permission to support that claim. The claim which petitioners wish to assert and dispose of is not embraced within the complaint. Petitioners seek to set up another kind of claim—one which would divert recovery to themselves.

It is not a mere matter of amending the complaint so as to embrace the claim sponsored by the petitioners, even assuming for the moment that it is the assertion of a corporate claim. The entire theory of the instant action by this respondent,— in fact, the pre-requisite of Section 9(a) itself—is that the corporation is not an enemy. Petitioners would require the statement of an alleged statutory cause of action which would conflict with the statute itself; that is to say, petitioners would not permit themselves to allege that the corporation is not an enemy; they would have to say that it was—or was not—an enemy to a certain extent. Such qualification either way would destroy their proposed cause of action in view of the statute.

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[4] See cases cited by petitioners in footnote 10 on page 14 of their petition.

We do not urge that contradictory claims may not be joined in a single complaint. What we do say is that petitioners' claim cannot be considered to be embraced within the instant complaint in a statutory action, since it would run counter to the statute.

Petitioners would not be precluded from asserting their proposed claim, should there be a judgment against the corporation, because they are asserting an individual right. Plainly this is not incorporated in the respondent's corporate cause of action. Actually, this can be best illustrated by making two comparisons, one of the instant intervention[5] with the suit which petitioners have filed in the Southern District of New York[6]; and the other, of the New York complaint with this respondent's suit here.[7]

The first comparison demonstrates that, except for the "class" nature of the proposed proceeding here, the two cases (New York action and instant intervention) are substantially the same in principle. Each seeks recovery for individuals out of the vested property.

The second comparison (New York action with this respondent's action) strikingly shows the difference between the individuals' objective and the result sought by the corporation. We submit that no one could seriously argue that a judgment in one case would be a bar to the other.

The opportunity to make these actual comparisons permits the Court to see the true picture. If petitioners have rights, they have protected them by a timely action in New York. A reading of the New York complaint shows that petitioners filed a claim with the Office of Alien Property, as required by Section 9(a) of the Trading with the Enemy Act. Their intervention papers here are silent upon this point. The reason is simple. The proposed intervention is an attempt at a class proceeding, but there

[5] See R. 47.
[6] See R. 85.
[7] See R. 1.

only three members of the class, comprised of those shareholders who have filed claims with the defendant.[8] Further claims cannot be filed, according to Section 33 of the Trading with the Enemy Act.[9] They try to overcome this fatal deficiency by parading in the name of the corporation and under the benefit of its timely filing of both claim and suit.

Obviously, petitioners realize this, and the intervention which they have devised is designed to overcome these statutory obstacles, not for themselves, but for the so-called "class" which they are trying to sponsor.

Rule 24(a)(3) is not the provision by which stockholders are permitted to intervene derivatively. It is relied upon by petitioners in this instance as the basis for asserting a direct or individual right in the corporate property.

It is well settled that in order to intervene as of right under this clause of Rule 24, the applicant must have a present actual interest in the property in issue. This is substantially what the Court of Appeals stated in rejecting the applicability of clause 3, the exact language of the Court being:

> " 'The law is well settled that one entitled to intervene as a matter of right under Rule 24(a)(3) F. R. C. P. "must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment." *Pure Oil Co.* v. *Ross*, 170 F. 2d 651 (C. C. A. 7, 1948).' "*Dowdy* v. *Hawfield*, ... U. S. App. D. C. ...., F. 2d ....; No. 104E5$ decided March 1, 1951." "'Clause (3) contemplates that the person having the right of intervention should have a legal interest in the property in the custody of the court.'" Citing *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116 (D. C., D. Dela., 1939); and comparing *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4, 1933); *Cross* v. *Missouri & A. Ry. Co.*, 74 F. Supp. 242

[8] See affidavit of Archer Henrick, Records Officer of the Office of Alien Property (R. 31).

[9] 50 U. S. C. Appendix, Section 33. See also, further discussion of this "class action" on page 14, *post*.

(D. C., W. D. Ark. 1947); and *In re Bender Body Co.*, 6 F. R. S. 379 (D. C., N. D. Ohio, 1942).[10] "Appellants have no such interest." "'The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members. *Donnell* v. *Herring-Hall Marvin Safe Co.*, 208 U. S. 267, 273.'" *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24.) If this basic principle were disregarded in connection with clause (3) the result would be that any stockholder in any corporation could insist on intervening in any suit involving a claim of the corporation to specific property."

It is submitted that the Court of Appeals is quite correct, in reliance upon an unbroken line of decisions of this Court, in holding that a stockholder has no interest in the property of his corporation. In addition to the two cases cited in the opinion, see *Eisner* v. *Macomber*, 252 U. S. 189, 208; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81; and *First National Bank* v. *Maine*, 284 U. S. 312, 329-330.

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[10] These cases fully sustain the proposition for which they were cited by the Court of Appeals. There seems to be no doubt as to this construction of clause (3). See also Moore's Federal Practice (Second Edition) paragraph 24.09 (pp. 43-46 of Vol. 4).

In a footnote on page 12 of their petition, petitioners criticize the Court of Appeals for relying upon the *Columbia Gas* case in the Delaware District Court. The criticism is that the principle relied upon by the Court of Appeals was overruled subsequently *in the same case* by the Supreme Court *sub. nom. Missouri-Kansas Pipe Line Co.* v. *United States*. 312 U. S. 502. This respondent disagrees with any such contention. The later decision did not touch upon the proposition for which the Court of Appeals cites the District Court opinion. In the earlier case, the stockholder, as here, had sought to intervene in its (the stockholder's) own right.

Petitioners also criticize the Court of Appeals for not discussing *Standard Oil Co.* v. *Clark*, 167 F. 2d 917 (C. C. A. 2, 1947); Cert. denied 333 U. S. 873, which they cited below, and in which they argue (p. 14 of their petition), "complicated intermixtures of enemy and non-enemy ownership in vested assets were unravelled as a basis for decreeing the return of vested assets commensurate with the non-enemy ownership." Assuming this to be so, the situation and problem involved in that case were far different from the ones in the case at bar. In the *Standard Oil* case, intermixtures of enemy and non-enemy ownership were capable of separation on the basis of direct ownership by Americans and Germans, respectively; while, here, petitioners seek to have the court separate, and release to them as their own property, vested corporate assets in which they have neither a direct nor recognizable, separable interest. Obviously the case is not at all analogous to the instant one.

However, if petitioners have such interest, they have another remedy, which they have embraced. That remedy is to bring a Section 9(a) proceeding; they have done so in New York, based upon their claim of interest in the vested property. The statutory remedy is exclusive; there are not and there cannot be two concurrent remedies. On the other hand, if petitioners do not have the interest required for the commencement of a Section 9(a) proceeding, then under the consistent interpretations of the Rule they have no right to intervene here. This dilemma conclusively establishes that petitioners have no right of intervention, and their only right, if any, is through the pending Section 9(a) proceeding in New York.[11]

Petitioners also rely upon the *Missouri-Kansas* case, *supra*, as a basis for intervention. That case is not in point, respondent submits. This Court made it very clear that the foundation for intervention there was the consent decree (p. 506). The decision seems so clear that it can be well understood why the Court of Appeals found no need to discuss it as creating an applicable basis for intervention in this case.

II.

Petitioners' Intervention Is Only Ostensibly and Not Truly Derivative, Whether In a Typical or An Exceptional Sense.

None of the cases relied upon by petitioners to support their position as derivative, are in point. In every one of them, and in all others which this respondent has examined, the claim which is being asserted is a corporate one. In the case at bar, the claim is individual, as elsewhere demonstrated in this brief.

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11 Incidentally, the Section 9(a) suit in New York draws into its control so much of the vested property as represents petitioners' proportionate interest in this respondent corporation. See 50 U. S. C. Appendix, Section 9(a). Such proportion cannot be sold as long as that suit is pending. (Ibid.)

In a typical derivative situation,[12] the plaintiff is the corporation and the shareholder intervenes, or the plaintiff is a shareholder and the corporation is a nominal defendant. The real defendant is (a) misfeasor stockholder-director-officer, or (b) debtor of the corporation, or (c) misfeasor third party. Recovery is in the name of the corporation.

In the exceptional derivative situation,[13] plaintiff is the corporation or a stockholder and the defendant (or one of the defendants) is a misfeasor stockholder-director-officer. As in the cases above, again a corporate claim is always asserted, but recovery may be had by a stockholder-plaintiff.

In either situation, the corporation is always essentially *entitled* to redress. If the court should decide that it is not essentially due to the corporation, the litigation is not successful.

As indicated above, the exceptional cases arise only where the misfeasor stockholder-director-officer is the defendant. The Attorney General or the United States do not come within this category; hence, there is no need to permit recovery by a stockholder, as in the exceptional cases, since there is no necessity to protect either the corporation or the minority stockholder from the Attorney General or the United States.

In the case at bar, the plaintiff is the corporation but the defendant is not the misfeasor stockholder-director-officer. If the Attorney General is considered as a misfeasor-third party, i.e., on the theory of conversion, he is such as to the corporation—not as to the stockholders.

In the exceptional cases, allowing recovery directly by the stockholder, recovery by the corporation is denied because misfeasor-stockholders should not participate in dis-

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[12] E. g. *Pyle-National Co.* v. *Amos*, 172 F. 2d 428 (7th Cir), and *Park & Tilford, Inc. v. Schulte*, 160 F. 2d 984 (2nd Cir.), cited by petitioners on page 14 of their petition.

[13] This reference is intended to embrace all the cases cited in the footnote on page 16 of the petition. See, also, the note in 120 A. L. R. 238.

tribution;—not because the corporation is *legally* disqualified to recover.

In the instant situation, if the claim is not recoverable by the corporation, it would be on the theory that misfeasor ("enemy") stockholders-officers-directors-management would be the cause of failure of corporate recovery. The false analogy occurs when petitioners try to liken the "enemy" stockholders to the misfeasor-defendants—to prevent participation in distribution; but in the case at bar the "enemy" management would have a different effect—it would prevent corporate recovery; the corporation would be thereby *legally* disqualified to recover.

The foregoing demonstrates, this respondent submits, that petitioners must fail in their attempt to simulate a stockholders' derivative action, because they do not fit any known category. Their fundamental impediment is the vice which permeates their entire case—they are *in reality* asserting an individual and not a corporate claim.

III.

Petitioners Cannot Maintain a Class Action Here.

It is submitted that petitioners cannot act in a representative capacity in this case.[14] Three points must be noted in connection with a class action: (a) There must be a class; (b) the persons in the class must be so numerous as to make it impracticable to bring them all before the Court; and (c) the character of the right must be common to all members of the class. See Moore's Federal Practice, Second Edition, Volume 3, page 3415 *et seq.* See, also, *Brotherhood of Locomotive Firemen, etc.* v. *Graham*, 84 U. S. App. D. C. 67, 72, 175 F. 2d 802, reversed on other grounds, 338 U. S. 232.

Petitioners alleged in their New York action (paragraph 6) that they had duly filed a claim with the Office of Alien Property, whereas, their proposed complaint here is silent

[14] See pp. 9-10, *ante*.

in this respect. This is obviously not an oversight for the reason stated on pages 9-10, *ante*.

Section 9(a) of the Trading with Enemy Act (50 U. S. C. App. 9a) requires the submission of a claim as an absolute prerequisite to the filing and maintenance of a suit for the recovery of vested property. Only two other stockholders of the plaintiff have filed claims. (See details in affidavit of OAP official, R. 31). Under section 33 of the Trading with the Enemy Act, as amended (50 U. S. C. App. 33), it is now too late for anyone else to file a claim in respect of the property of this respondent which was vested. Petitioners filed their New York action within the statutory period.

Petitioners define the class as "non-enemy" stockholders. This Court established in the *Ueberlee* case, *supra*, the rule that a claimant under Section 9(a) must be free from "enemy taint." Whatever that term means, it involves the factual determination as to the status of a claimant. Naturally, it is not likely that any two claimants will occupy identical positions, or as elsewhere stated in this brief, every claimant must establish his own lack of "enemy taint" by evidence which will be different from that of every other claimant.

For petitioners to say that they represent a "non-enemy" class is to beg the question. As indicated above, a trial court would have to try as many separate cases as there are shareholders.

In order for a person to be entitled to bring an action on behalf of a class, the class must actually exist and the members of it must actually be similarly situated to plaintiff. See *Hansberry* v. *Lee*, 311 U. S. 32, 45; *Weeks* v. *Barco Oil Co.*, (C. C. A. 7th, 1941) 125 F. 2d 84; *Mitchell* v. *Wright*, 9 F. R. S. 23a. 11, Case 2, 62 F. Supp. 580 (D. C. M. D. Ala. 1945), reversed on other grounds, 154 F. 2d 924, cert. denied, 329 U. S. 733; *Speed* v. *Transamerica Corporation*, 5 F. R. D. 56. 9 F. R. S. 23a, 33, Case 2, (D. C. D. Del. 1945).

The result of the foregoing is as follows: (a) There is truly no class; (b) if there were, it would be limited to a maximum of three claimants; and (c) a class action may not be brought on behalf of such a *small* class. See *Atwood* v. *National Bank of Lima*, (C. C. A. 6th 1940), 115 F. 2d 961.[15]

IV.

The New York Proceeding Affords Petitioners Full Opportunity to Test Out Their Theory Under the Uebersee Case.

The civil action duly filed by the petitioners, *individually*, in New York, squarely presents what petitioners call the "Uebersee issue" and in the exact manner in which they define that "issue."

In other words, petitioners derive from this Court's observations at the end of its opinion in the *Uebersee* case the conclusion that if a corporation is ineligible to recover *all* its vested corporate property, then somehow a portion of such property may be recovered commensurate with the quantity of the interest of its "non-enemy" stockholders—not for the benefit of the corporation as a whole, but only for the "non-enemy" stockholders.

But petitioners still try to make this a corporate claim in order to maintain their present effort to intervene. We have hereinbefore demonstrated why it cannot be a corporate claim. We emphasize again that petitioners' reasoning contemplates recovery only by and for *individuals*. Moreover, how can this corporation maintain a cause of action where the peculiar status of each of its stockholders is the issue, and the status of each stockholder is different from that of every other one? Take, for example, Mr. and Mrs. Kaufman, who lay claim to eighty-six shares of stock.

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[15] In view of what we have just concluded, it is unnecessary for us to make the additional point, which we regard as valid, that the character of the alleged right is not common to all members of the class. (See FRCP 23 (a) (1)). Compare, *Knowles* v. *War Damage Corporation*, 83 U. S. App. D. C. 388, 171 F. 2d 15, cert. denied, 336 U. S. 914.

in this respondent corporation. They, as every other claimant under the Trading with the Enemy Act, must be free from "enemy taint." What is their personal history? What were their relationships with Germany? Did they acquiesce in or ratify that which the Custodian claims to constitute "enemy taint" on the part of the corporation? These are general questions which contain many subdivisions raising the particular and peculiar status of each stockholder.[16]

Ownership of shares in respondent corporation on February 16, 1942—the date of vesting—is essential, even if all other hurdles were overcome.[17] This respondent's common shares at that time—and until December, 1945—were bearer. It is not even possible in this case to resort to corporate records to establish who owned such shares on the crucial date or dates.

Neither party to this petition can presume to know to a certainty what this Court had in mind at the end of its opinion in the *Uebersee* case. But, it is submitted, this is not the case in which to test out the matter. There are too many obstacles standing in the way before the crucial point is reached.

In sum, the petition herein (1) conflicts with the rules of intervention; (2) it does not fit any known formula for the assertion of stockholders' derivative rights; and (3) it violates the principles applicable to class actions. It asks this Court to rule, contrary to an unbroken line of its decisions, that, in the circumstances of this case, a stockholder has a distinct and severable interest in the assets of a corporation proportionate to his stock ownership; and, more-

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[16] Petitioners argue on page 13 of their petition that their present effort avoids a "multiplicity of actions," which they recognize to be bad. Plainly, there can be no such avoidance.

[17] Referring to the affidavit of Hans Gut (R. 69), petitioners claim in footnote 2 on page 2 of their petition that "non-enemy" owners of over 11,000 shares "have formally supported petitioners in this proceeding," but the affidavit is significantly silent as to whether any of the shareholders in the Gut group were such on February 16, 1942. Gut's company is the only shareholder specifically mentioned in the affidavit, and he cannot establish ownership of his alleged twenty-five shares on that date.

over, it asks this Court so to rule in a case that is subject to the foregoing infirmities, while petitioners have pending a duly filed action of their own in which the point is squarely and clearly presented.

Petitioners are not making their own fight in the attempted intervention in the case at bar. Instead, it is crystal-clear that they are seeking redress for a class which does not exist and are using this as a pretext to enter the instant litigation.

V.

Petitioners Cannot Intervene To Prevent A Settlement Between Respondents.

This respondent submits that petitioners should not be permitted to intervene for the purpose of blocking a settlement. Certain generalities will first be mentioned.

The proposed settlement is not attacked as being the product of fraud or bad faith on the part of this respondent's management. There is no accusation of collusion between the parties. It is not urged that the main action should be prosecuted to a conclusion without abatement; nor that a settlement of anything less than 100% is not acceptable. There is and could be no charge that the proposed compromise is not the result of the exercise of fair and experienced business judgment.

The basis of petitioners' claim that they have a right to intervene in order to prevent a settlement of the litigation is the same contention elsewhere made that as "non-enemy" stockholders, they have individual proportionate rights to the assets of the corporation and that those rights should not be diminished by a ratable distribution to all stockholders, whether enemy or non-enemy. If petitioners-stockholders have no interest in the corporate property that would sustain a Section 9(a) proceeding, then they have no interest sufficient to permit them to intervene to prevent a settlement of this corporate claim. The decision in the Section 9(a) case brought by them in the Southern

District of New York will determine the question of interest and there is no place in this proceeding for its determination.

Petitioners, as stockholders, have no status to prevent a beneficial settlement by the corporation, except in case of fraud or collusion between the corporation and the other parties to the litigation. The propriety of the claimed settlement is not challenged and it cannot be challenged. And when it is remembered that this suit is, in substance, one against the United States, it is clear that petitioners are not in a position to restrain or prevent the United States from making any settlement or disposition of this litigation which the Attorney General, as its properly authorized officer, may determine to be in the public interest.

The case of *Pyle-National Co.* v. *Amos, supra,* is typical of cases of fraud and collusion between a corporation and the other parties to the litigation. In that case, a stockholder sought and was permitted to intervene in a pending suit by his corporation against former directors. He claimed that the management was not vigorously prosecuting the action, and that the parties were about to effect an inadequate compromise. But, the intervention was for the purpose of preventing a compromise that would have hurt the corporation, and not, as here, one that it is claimed would hurt a group of stockholders.

To summarize: if it should be decided that petitioners have some right, title or interest in the corporate property, they cannot be hurt by a compromise between the respondents, since their individual action would survive such a settlement; and if they have no individual proportional rights, apart from those of "enemy" stockholders, they have no basis for complaint about a compromise.

CONCLUSION.

The petition for a writ of certiorari does not, in our opinion, present any question requiring further review of this case by this Court. We therefore submit that it should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 172.

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A. ETC.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian,

GEORGIA NEESE CLARK, Treasurer of the United States, and

REMINGTON RAND INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

MEMORANDUM FOR RESPONDENT, REMINGTON RAND INC., IN OPPOSITION.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Remington Rand Inc., Respondent.

URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK,
Of counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

MEMORANDUM FOR RESPONDENT, REMINGTON RAND INC., IN OPPOSITION.

OPINIONS BELOW.

The oral opinion of the District Court (R. 74) is unreported. The opinion of the Court of Appeals (R. 79) is at 188 F. 2d 1017.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

Can American stockholders of a Swiss corporation intervene, either individually or as members of a class, in a proceeding brought by the corporation under Section 9(a) of the Trading With the Enemy Act to recover property vested by the Alien Property Custodian?

STATUTE AND RULE INVOLVED.

The statute and rule involved are set forth in Appendix A to the Petition (pp. 19-26).

STATEMENT.

Petitioners were denied the right to intervene in a Section 9(a) proceeding under the Trading With the Enemy Act. Remington Rand Inc. seeks to have reviewed by its petition for certiorari in No. 148, now pending before this Court, the judgment of the Court of Appeals affirming the trial court's action in dismissing its intervening petition.

If this respondent, Remington Rand and Interhandel prevail on their claim to the General Anilene & Film Corporation stock, the petitioners in this case clearly have no cause of action. The claim of respondent, Remington Rand Inc. is contingent upon the return to respondent, Interhandel, of the money and securities now held by the Office of Alien Property. The management of the corporation in which these petitioners are stockholders, and the respondent, who claims a contractual interest with that corporation in a large portion of the property involved in the 9(a) proceeding under the Trading With the Enemy Act, are asserting every effort to establish Interhandel's claim to *all* of the vested property.

Under these circumstances, the petitioners, as stockholders, either on their own behalf or on behalf of a class, have no standing to sue for or recover any corporate property or interest. This proposition of the law of corporations is too well settled to require the citation of authorities. There is nothing in the Trading With the Enemy Act to alter this well-established rule of corporate law.

CONCLUSION.

Therefore, this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM P. MACCRACKEN, JR.,
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URBAN A. LAVERY,
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Of counsel.

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IN THE

Supreme Court of the United States

October Term 1951

No. 172

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., Etc.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

MOTION BY RESPONDENTS TO TRANSFER THE CASE FROM THE SUMMARY DOCKET TO THE APPELLATE DOCKET AND TO ALLOW ONE HOUR OF ORAL ARGUMENT TO BE SHARED BY BOTH RESPONDENTS.

The Solicitor General, on behalf of the Attorney General, as successor to the Alien Property Custodian, respondent, and Roger J. Whiteford and John J. Wilson, counsel for Societe Internationale pour Participations Industrielles et Commerciales, S. A., etc., respondent, respectfully request that the above-entitled case be trans-

ferred from the summary docket to the appellate docket so that one hour of oral argument may then be allowed the respondents and may be shared between them.

This case may have been placed on the summary docket because of an apparent similarity to *Uebersee Finanz-Korporation, A. G., Petitioner* v. *J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian,* No. 178. At most, the two cases have one point in common; they are far more dissimilar than similar. Each case raises many issues, needful of full argument, which are in no wise raised in the other.

The major reason for this motion is that there are two respondents, the Attorney General as successor to the Custodian, and Societe Internationale, etc., the plaintiff in the underlying suit against the Custodian under Section 9(a) of the Trading with the Enemy Act, in which petitioners are seeking to intervene. The case between the plaintiff and the Custodian has an unusually complex nature and history which should be stated adequately for an understanding of the petition for intervention. Beyond this, the petition for intervention raises a number of procedural and substantive issues of the right to intervene generally, of the rights of minority stockholders to intervene in corporate litigation, of the right of stockholders to require their corporation to bring suit for the benefit of some only of the stockholders, and of the rights of minority stockholders to a share of the property vested from the corporation. Moreover, the Custodian and the corporate plaintiff have divergent interests as to some of the issues involved, requiring separate statement by each of them. The petitioners, minority stockholders in the plaintiff, and the plaintiff corporation necessarily have a relationship with each other in which the Custodian has no part. Accordingly, issues have arisen between the minority and the corporation which are of interest only to them. There are other issues which arise directly between the Government and the petitioning minority stockholders. One is the bearing on this case of the separate suit brought by the

petitioners against the Custodian in the District Court for the Southern District of New York, to which the corporation is not a party.

Rule 28, paras. 3 and 6, of the Rules of the Court provides that one-half hour is allowed for the argument of cases on the summary docket and that in such cases only one counsel will be heard on the same side. We are informally advised by the Clerk that where, as here, there are two respondents, they may divide the allotted half hour. A division of time is, we believe, necessary, but we think that a limitation of our total time to a half hour would seriously prejudice the presentation of our cases.

It is therefore requested that the motion be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

Attorney for the respondent J. Howard McGrath, Attorney General of the United States.

ROGER J. WHITEFORD,
JOHN J. WILSON.

Attorneys for Respondent, Societe Internationale Pour Participations Industrielles et Commerciales, S. A., etc.

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v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc., J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, AND REMINGTON RAND, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, IN OPPOSITION.

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 74) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 79) is reported at 188 F. 2d 1017.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 5, 1951 (R. 81). The petition for a writ of certiorari was filed on July 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit by a Swiss corporation for the return of corporate property vested under the Trading with the Enemy Act, non-enemy holders of a small block of shares in the corporation are entitled to intervene in order to assert a cause of action, to be prosecuted by the corporation for the benefit of the intervening stockholders, for the return to such stockholders of a portion of the assets equal to the proportion of shares held by them.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure (28 U.S.C., following § 723c) provides:

> (a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other

disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

STATEMENT

Societe Internationale Pour Participations Industrielles et Commerciales S. A., etc. (I. G. Chemie) brought an action in the United States District Court for the District of Columbia under Section 9(a) of the Trading with the Enemy Act (40 Stat. 419, as amended, 50 U.S.C. App. 9(a)), for the return of vested property (R. 1-15). The property involved, *inter alia*, is most of the stock of General Aniline & Film Corporation, of Delaware, which the plaintiff asserts is worth more than $100,000,000. The complaint, against the Attorney General[1] and the Treasurer of the United States, alleges, in essence, that the corporation is the owner of the property and is not an enemy within the meaning of the Trading with the Enemy Act. The answer filed by the Custodian (R. 15-30) denies that the plaintiff corporation is the owner and denies that plaintiff is not an enemy, and as a defense alleges that between 1928 and 1945 plaintiff and others engaged in a world-wide conspiracy

[1] By Executive Order No. 9788 (Oct. 15, 1946, 11 F.R. 11981), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor and the Treasurer of the United States (a nominal defendant).

to cloak assets of I. G. Farbenindustrie, Germany.

Petitioners, alleging that they are non-enemies and owners of 86 shares of the outstanding capital stock of I. G. Chemie, on March 9, 1950, filed suit against the Custodian in the United States District Court for the Southern District of New York under Section 9(a) of the Trading with the Enemy Act. They sought the return to them of a share of the vested assets equal to the proportion of their stockholdings in the corporation (R. 85). A motion to dismiss for failure to state a cause of action was denied on October 5, 1950, without opinion. *Kaufman* v. *McGrath*, S.D.N.Y. Civ. No. 56-246.

Shortly after filing their suit in New York, petitioners, on March 14, 1950, filed in the District Court for the District of Columbia a motion to intervene in the pending action by the corporation against the Custodian. After the court's denial of the motion on May 24, 1950 (R. 33), petitioners filed an amended motion for leave to intervene (R. 44) and an amended proposed complaint (R. 47-68). In their amended proposed complaint, brought for themselves and for all stockholders of I. G. Chemie similarly situated, petitioners allege that they are personally non-enemies and holders of 86 shares of I. G. Chemie having a current market value of about $15,000, and that the corporation is entitled to a return of the portion of the vested assets equal to the percentage of the stock in the corporation held by non-enemies, such portion to

be returned for the exclusive benefit of the non-enemy stockholders (R. 47-67). The proposed amended complaint seeks to enjoin the corporation and the Custodian from settling the principal action unless provision is first made for the payment demanded by the petitioners (R. 67).

Petitioners' amended motion for leave to intervene was denied by an order dated June 30, 1950 (R. 73-74). The Court of Appeals for the District of Columbia Circuit (Circuit Judges Edgerton, Proctor, and Fahy) affirmed the district court, holding that petitioners are not entitled to intervene under either Rule 24(a)(2) or Rule 24(a)(3) of the Federal Rules of Civil Procedure (R. 79-80).

ARGUMENT

The salient fact with respect to petitioners' case is nowhere stated in the petition. It is that petitioners, who own 86 shares[2] in plaintiff corporation, are attempting to intervene to require their corporation to prosecute a claim to a portion of the vested assets and that this claim is to be for the benefit of the intervening class of non-enemy stockholders in the plaintiff corporation, as distinguished from all of the stockholders or the corporation (R. 67).

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[2] The references in the petition to 11,000 shares are supported only by an affidavit by a Swiss citizen stating that holders of 11,000 shares have grouped together and may join in the complaint of intervention or intervene independently (R. 69, 71).

This is the essence of petitioners' cause of action. Once it is revealed, the rulings below denying intervention are seen to be plainly justified. The court of appeals held against intervention on three grounds, each ground directed to an aspect of petitioners' theory. The court of appeals held (1) that because petitioners are asserting individual and not corporate rights, they will be unaffected by any judgment given in their absence from the corporation's suit, and thus that Rule 24(a)(2) does not authorize intervention; (2) that petitioners are not entitled to intervene under Rule 24(a)(3) because as stockholders they have no direct interest in a share in the corporate assets; and (3) that intervention cannot be permitted because petitioners' individual claim may not be vicariously asserted by the corporation.

1. Since petitioners' claim to part of the assets is grounded on their individual status as non-enemies and is thus personal to them, they will not be bound or prejudiced by any judgment made in their absence from the corporation's case, and the court below so held. The judgment in the case will pass on the corporation's claim in the right of the corporation and of all its stockholders, a wholly different issue from that sought to be raised by petitioners. Petitioners seek to intervene to ward off a defeat to the corporation or a settlement of

the case by the corporation,[3] on the allegation that such a defeat or a settlement would injure their rights as non-enemy stockholders (R. 56, 58, 62, 66, 67). But total or partial defeat of the corporation in its suit to make itself whole can affect only the corporation and all of its stockholders equally. Petitioners' theory is that as non-enemy, non-tainted stockholders they are entitled, aside from, and even against, the rights of the other enemy stockholders, to a share in the corporate assets equal to the precentage of petitioners' holdings in the corporation. That alleged right, and the consequences which would flow from it, are not and cannot be in issue in the suit by the corporation, and the judgment will thus not bear on that right.

Petitioners may protect their alleged right to a share of the vested assets by bringing suit. They have done just that, in a suit for their alleged share in the corporation's assets, brought by them against the Custodian in the Southern District of New York (R. 85).[4] And their complaint in that

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[3] If the corporation prevails in its suit, petitioners' case will become moot, for to the extent that the corporation is made whole, the damage to the petitioners' alleged rights is dissipated. This, however is not the eventuality on which petitioners base their efforts to intervene.

[4] At one point (Pet., p. 10, n. 7), petitioners intimate that in their New York suit the Custodian made an argument in support of petitioners' position in this suit in the District of Columbia. The Custodian merely argued, however, that peti-

action has been upheld against the Custodian's motion to dismiss. *Kaufman* v. *McGrath*, D.C.S.D. N.Y., Civ. Action No. 56-246, Oct. 5, 1950, without opinion. We think that decision wrong but there can be no dispute that the existence of the suit in New York, and the interlocutory holding in favor of petitioners' legal right to recover, are indisputable proof that the right they allege here, if it is valid, will certainly not be affected by the ultimate outcome of the instant suit. Their remedy is saved and complete.[5]

In hard fact, petitioners have a perfect remedy in their pending suit in New York. Instead of pursuing that remedy for their alleged $15,000 interest, they are seeking here to block a settlement between the corporation and the Custodian of disputed property valued at between fifty and one hundred million dollars (R. 2, 56, 58, 66, 67). By the provisions of Section 9(a) of the Act, their New York action succeeds in tying the Custodian's hands only with respect to the minute fraction of the property which they can claim. If they were

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tioners had no direct rights at all, and that their indirect economic interests, equally with those of the other stockholders, should be settled in the District of Columbia suit brought by the corporation in the corporate right.

[5] Even if the court of appeals erred in holding that they would not be bound or concluded by a judgment in the corporation's suit, petitioners are amply protected by the very fact that such a holding was made. Right or wrong, that decision settles the issue for petitioners and respondents.

allowed to intervene in this suit, however, they could prolong almost indefinitely the litigation and the dependent question of the disposition of the assets. In seeking this position of power in the lawsuit, they run counter to the lack of congressional consent to a suit to enjoin a settlement of a pending suit against the United States and to the public policies against vexatious litigation and against efforts to prevent litigants from settling their lawsuits. *Kendall* v. *United States*, 7 Wall. 113, 116.[6]

2. The court of appeals held that petitioners, as stockholders in plaintiff corporation, do not have the direct interest in the subject matter of the main action—the corporate assets—which is required by Rule 24(a) to support an intervention.[7] This hold-

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[6] The existence of their separate suit forces petitioners into other inconsistencies. For instance, they support their right to intervene by arguing, in paraphase of the language of Federal Rule 24(a)(3), that the vested property is "before the court" in the corporation's action in the District of Columbia (Pet., p. 7). They are thus arguing that the same property is before two different courts. The property sued for by the corporation is no more "before" the District of Columbia court than is the share of the same property, sued for by petitioners, "before" the district court in New York. Moreover, and this would apply to petitioners' point even without its inconsistency, by Sections 5(a), 9(f) and 12 of the Trading with the Enemy Act, vested property is not before or in the control of the court, except that it may not be sold pending suit for its return.

[7] Petitioners argue (Pet., pp. 12, 14) that the court below was inconsistent in its two holdings that petitioners will not

ing applies the elementary principle that the stockholder can have no rights in the assets of the corporation. *Klein* v. *Board of Tax Supervisors*, 282 U.S. 19, 24; *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69, 81; *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273. The principle has never had occasion to be stated in a case under the Trading with the Enemy Act, but it has been fully set out in a leading international case involving enemy property (*Standard Oil Tankers Case*, Arbitration Award, August 5, 1926, 2 *Foreign Relations of the United States*, 1926, p. 166), and its force in the domestic field of enemy property is assumed (Maurer, *Protection of Non-Enemy Interests in Enemy External Assets*, 16 Law & Contem. Prob. 407, 422 (1951)). Petitioners seek to overcome this elementary principle by relying upon *Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U.S. 873, and by asserting that the question is important and has been anticipated but left undecided by this Court in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489-490 (Pet., pp. 3, 5, 6-7, 14, 17).

The *Standard Oil* case merely illustrates a careful division, between the Custodian and the non-

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be bound, with respect to their claim, by the judgment in the corporation's suit on its claim and that petitioners have no legal rights in the assets vested from the corporation. Quite the contrary. Petitioners are asserting an individual, personal—and not a corporate—right. Both holdings follow from this fact, as applied to the rules on intervention.

enemy claimant, of property (stock, patents and equitable rights in patents) which had been juxtaposed and intermingled in a complicated manner between a non-enemy and an enemy corporation associated together in business activities. The case did not involve at all the rights of a stockholder to a share of the assets vested from his corporation.

In the concluding words of its opinion in *Uebersee*, set out in the footnote,[8] this Court disclaimed its intention to decide a variety of issues. Some of the questions raised by *Uebersee* were of undoubted importance. Congress is presently considering the question of compensation for the economic losses sustained by friendly stockholders

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[8] "It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification." (332 U.S. at 489-90).

in enemy-tainted corporations where the corporation's property has been vested under the Act. S. 3901, H.R. 8998, H.R. 8422, H. Doc. 628, 81st Cong., 2nd Sess.; H.R. 133, H.R. 2263, H.R. 4284, 82nd Cong., 1st Sess. But the settled principle that such a stockholder has no direct legal interest in the corporation's assets, capable of being asserted or enforced against the Custodian, has not been left open by this Court or by Congress for judicial qualification or nullification.

Petitioners rely on the posed question (note 8, *supra*) of "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears." That phrase is not involved in the holding in this case. The court of appeals did not decide that all the property of a friendly alien corporation may be retained when only a fractional enemy ownership appears, or that under no circumstances may some of the property be returned. It made the different and limited ruling that the non-enemy stockholders do not have the direct interest in the corporate property, required by Federal Rule 24 (a) (3), for intervention in the corporation's suit.

3. Lastly, the court of appeals held against intervention because the corporation cannot be called upon to litigate a claim for the benefit of some of its stockholders. This Court has flatly ruled that a corporation has "no 'standing vicariously' to assert the interests of its shareholders." *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 474. The ruling in *Silesian* rests on general principles of

corporate and real-party-in-interest law and embodies as well the principle of the Trading with the Enemy Act which forbids suits by those who seek to raise the rights of others. *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 850 (C.A. 2), certiorari denied, 269 U.S. 583; *Shinsaku Nagano* v. *Clark*, 85 F. Supp. 368, 374 (N.D. Ill.), reversed on other grounds, *sub nom. Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C.A. 7); *Kaname Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937. Thus, petitioners cannot intervene to force their corporation to present a claim which the corporation has, itself, no standing to present.

The petition relies (Pet., pp. 10, 15) on *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502. That case is wholly in accord with the decision here. The intervention of a stockholder—Missouri-Kansas—was allowed in corporate litigation in order that it present, derivatively, a right of the corporation. 312 U.S. at 506-8. Previously, intervention had been disallowed when the same stockholder had presented its own claim. 312 U.S. at 508; *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116 (D. Del.), appeal dismissed, *sub nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied, *sub nom. Missouri-Kansas Pipe Line Co.* v. *Columbia Gas & Electric Corp.*, 309 U.S. 687.

It is improper for a corporation to assert the claim of a stockholder, or for the stockholder to intervene to require the corporation to do so. This

principle alone would bar petitioners' intervention. It is doubly improper when that claim, as here, is on behalf of some, non-enemy stockholders and is in direct conflict with the interests of the other, enemy stockholders. For petitioners' theory—that they are entitled because they are non-enemies—jettisons the enemy stockholders. The corporation may not be put in the position of having conflicts of loyalty to its various stockholders. The premise of petitioners' proposed complaint is that the corporation has the duty to present the claim of the non-enemy stockholders as against the enemy stockholders, and that on its failure to do so, the beneficiaries may intervene to act for the corporation. There being no such duty, there is no right of intervention to enforce performance of the duty.

4. Petitioners repeatedly intimate that to deny intervention by persons of their status will result in numerous actions by individual stockholders,[9] as against single actions by the corporation, with consequent interference with the administration of the Trading with the Enemy Act (Pet., pp. 7, 8, 9, 13, 16). Their concern over the administration of the Act is not shared by the Alien Property Custodian, who is charged with administration. The petitioners are the only stockholders in plaintiff cor-

[9] In their concern over the possibility of many separate suits, petitioners ignore the possibilities of joinder of such suits. In assuming that separate suits are an evil, moreover, they ignore the fact that while such suits would raise a common question of law, they would raise most uncommon issues of the degree of taint of each of the stockholding plaintiffs.

poration who have brought such a suit and the statute of limitations has run on the other stockholders. Moreover, there is at most only one other instance where both the stockholder and the corporation have brought suit.[10] There are no other instances where a stockholder has sought to intervene in his corporation's suit.

CONCLUSION

The decision below is correct; there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
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JAMES D. HILL,
GEORGE B. SEARLS,
DAVID SCHWARTZ,
SIDNEY B. JACOBY,
Attorneys.

AUGUST 1951.

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[10] Fritz von Opel, asserting a share interest in Uebersee Finanz-Korp., has brought suit in the Southern District of New York and in the District of Columbia. *Fritz von Opel* v. *McGrath*, S.D.N.Y. Civ. 50-70; *von Opel* v. *Clark*, D.C.D.C. Civ. Action No. 1910-49; *von Opel* v. *Clark*, D.C.D.C. Civ. Action No. 1923-49. In two other cases, the corporations involved did not file suit, and a non-enemy stockholder in each of them has sought to raise directly his alleged right to an aliquot share in the corporate assets. *Bank Waedenswil* v. *McGrath*, D.C.D.C., Civ. Action No. 1902-49; *Theising* v. *McGrath*, D.C.D.C. Civ. Action No. 1903-49.

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SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC., J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, AND REMINGTON RAND, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS, J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 172

ERIC G. KAUFMAN AND AENNI C. KAUFMAN,
PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC., J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, AND REMINGTON RAND, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS, J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia on

the denial of petitioners' original motion (R. 33) is reported at 90 F. Supp. 1011. The memorandum opinion on denial of the amended motion (R. 74) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 79-81) is reported at 188 F. 2d 1017.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 5, 1951 (... 82). The petition for a writ of certiorari was filed on July 3 and was granted October 15, 1951 (R. 86). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners, nonenemy stockholders, seek to intervene in an action brought by their corporation against the Alien Property Custodian for the return of vested assets of the corporation. The following questions are presented:

1. Whether the corporation has any right or duty to present a cause of action for a portion of the corporate assets, for the benefit of nonenemy stockholders, so that where the corporation has failed to present the cause, petitioners may present it in the right of the corporation;

2. Whether the nonenemy stockholders have a recoverable interest in assets vested from their corporation;

3. Whether, with respect to their asserted interest, the stockholders may be "bound" by the judgment in an action for return brought by the corporation, within Federal Rule of Civil Procedure 24(a)(2), or may be "adversely affected" by a disposition of property in which they have an interest, within Rule 24(a)(3), and thus may intervene in the corporation's action as of right;

4. Whether the stockholders have a cause of action, or a right to intervene to present a cause of action, to enjoin an impending settlement between the Custodian and the corporation pursuant to which payments would be made to the corporation for the benefit of all of its stockholders.

STATUTES INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure and the pertinent sections of the Trading with the Enemy Act are set out in the Appendix, p. 52, *infra*.

STATEMENT

Societe Internationale Pour Participations Industrielles et Commerciales S.A., etc. (I.G. Chemie), a Swiss corporation, brought an action against the Attorney General[1] in the United States District Court for the District of Columbia under

[1] By Executive Order No. 9788 (Oct. 15, 1946, 11 F.R. 11981), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor. The Treasurer of the United States is a nominal defendant.

Section 9(a) of the Trading with the Enemy Act (Appendix, p. 54, *infra*), for the return of vested property (R. 1-15). The property sued for is over 90% of the stock of General Aniline & Film Corporation, of Delaware, which the plaintiff alleges to be worth more than $100,000,000, and bank accounts totalling over $1,800,000. The complaint alleges, in essence, that the corporation is the owner of the property and is not an enemy within the meaning of the Trading with the Enemy Act. The answer filed by the Custodian (R. 15-30) denies that the plaintiff corporation is the owner and denies that plaintiff is not an enemy; as a defense it alleges that between 1928 and 1945 plaintiff and others engaged in a world-wide conspiracy to cloak assets of I.G. Farbenindustrie, Germany.

Petitioners allege that they are nonenemies and own 86 shares[2] of the some 300,000 outstanding shares of capital stock of I.G. Chemie. On March 9, 1950, they filed suit against the Custodian in the United States District Court for the Southern District of New York under Section 9(a) of the Trading with the Enemy Act (R. 83-6). They sought the return to them of a share of the vested assets equal to the proportion of their stockholdings in the corporation (R. 85-86). A motion to

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[2] Petitioners' reference to 11,000 shares (Brief, p. 3, n. 6, pp. 8-9) rests on an affidavit filed the day before the district court's judgment, in which a Swiss citizen affirms that persons holding 11,000 shares "intend" to become parties or to intervene "independently" (R. 71).

dismiss for failure to state a cause of action was denied on October 5, 1950, without opinion. *Kaufman* v. *McGrath,* S.D.N.Y. Civ. No. 56-246.

Shortly after filing their suit in New York, petitioners, on March 14, 1950, filed in the District Court for the District of Columbia a motion to intervene in the pending action by the corporation against the Custodian. After the denial of the motion on May 24, 1950 (R. 33-35), petitioners filed an amended motion for leave to intervene (R. 44) and an amended proposed complaint, brought for themselves and for all stockholders of I.G. Chemie similarly situated, and, the corporation having refused to sue, in the right of the corporation. Petitioners alleged that they, personally, are nonenemies and holders of 86 shares of I.G. Chemie having a current market value of about $15,000, that the corporation is a nonenemy to the extent it is owned by nonenemies, that the corporation is entitled to a return of the portion of the vested assets equal to the percentage of the stock in the corporation held by nonenemies, such portion to be returned for the exclusive benefit of the nonenemy stockholders (R. 47-57, 67). Separate counts seek to enjoin the corporation and the Custodian from settling the principal action (R. 57-67).

Petitioners' amended motion for leave to intervene was denied in an opinion and an order dated June 30, 1950, the trial court reading a memo-

randum opinion from the bench (R. 73-76). The Court of Appeals affirmed, holding that petitioners are not entitled to intervene under Federal Rule of Civil Procedure 24(a)(2) because, in their absence from the suit, they could not be deprived of their claimed right to a share of the assets and thus would not be "bound" by the judgment; that they have no right to intervene under Federal Rule 24(a)(3) because as stockholders they do not have a recognizable interest in the property vested from the corporation; and that the corporation has no standing to assert an interest claimed by its stockholders, the petitioners (R. 80-81).

ARGUMENT

Introduction and Summary

The petitioners, nonenemy stockholders in the plaintiff corporation, seek intervention as of right to present a cause of action for that part of the assets vested from the corporation equal to the percentage of nonenemy stockholders in the corporation. The right to intervene is grounded upon an asserted corporate right and duty to sue, yet the return which is demanded is a return to the nonenemy stockholders of their interest in the assets.

Intervention as of right is sought under two separate clauses of Federal Rule 24(a) (Appendix, p. 52). It is urged that under clause (2) petitioners may be bound by the judgment given in their absence and that under clause (3) they will be ad-

versely affected by the disposition of the property made in their absence from the suit. In opposition, the Custodian makes two main contentions. Acceptance of either disposes of both grounds on which intervention is sought.

Our first point (p. 10, *infra*) is that there is neither corporate right nor duty to bring a suit for the benefit of the nonenemy stockholders in the corporation. A corporation owes no duty to a few of its stockholders to litigate for their personal benefit. Especially is this true where the interests of the few conflict with the interests of all the stockholders, who would be the beneficiaries of the total recovery sought by the corporation. Even if the corporation would, it could not sue for the nonenemy stockholders. The Trading with the Enemy Act requires suit to be brought by the real party in interest. This Court has held that a corporation has no standing to assert against the Custodian the rights of its stockholders. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469.

It follows that petitioners will not be bound by the judgment given here and thus that they have no right to intervene under Federal Rule 24(a)(2). If nonenemy stockholders have a right to a share of the assets proportionate to the stock they hold, that right will not be determined by this suit, for it will not be in issue. They may bring a separate suit to establish that right, as petitioners have individually done in a suit for their own proportionate share filed in the Southern District of New York.

From the conclusion that the corporation cannot raise the rights of its nonenemy stockholders, it follows, too, that there is no right to intervene under clause (3) of Rule 24(a). For petitioners will not be "adversely affected" by the progress and conclusion of this suit. In this suit the court will dispose only of the corporation's right to a return of all the property, for the benefit of the corporation and of all its stockholders. The outcome here can affect the nonenemy stockholders only favorably. To the extent that the corporation recovers part or all of the property, the recovery will reduce the indirect loss to all stockholders, including petitioners, caused by the vesting. To the extent that the corporation does not recover, the property remaining in the Custodian's hands will be available to satisfy any judgment that stockholders may obtain in individual actions.

Our second point (p. 20, *infra*) is that the nonenemy stockholders have no recoverable interest in the property vested from their corporation, no matter whether they or the corporation bring the suit for their benefit. The property was vested from the corporation as that of an enemy. By Section 9(a) only those who have an "interest" in the property may have a return. Stockholders have no interest in the corporate assets, by the terms and scheme of the Act and by general principles of law. This point is discussed at length below; but the Court need reach it only if it holds, contrary to our first contention, that the corporation has the right

and duty to bring suit for the nonenemy stockholders. If reached, however, the lack of interest also disposes of the claim to intervention under both clause (2) and clause (3) of Rule 24(a). The judgment will bind the stockholders only as to their indirect economic interest in the amount which the corporation is seeking to recover and thus Rule 24(a)(2) is unavailing. Rule 24(a)(3) is equally closed to them because they have no interest in the property being disposed of and thus can suffer no adverse effect.

Petitioners also seek an injunction against a settlement of the action by the corporation and the Custodian. They argue that a settlement would prejudice their rights and would, moreover, be illegal under the Trading with the Enemy Act. The claim of prejudice to the rights of nonenemy stockholders is disposed of if the corporation has no status to sue for the stockholders (Point I) or if the nonenemy stockholders have no interests for which any suit can be brought (Point II). If the claim of prejudice fails, then petitioners have no standing to attack the legality of any settlement. In any event, the claim of illegality lacks merit. It rests on the fact that 11% of the stockholders in plaintiff are admitted to be enemies and upon an alleged policy of the Act against any monies going to corporations in which there are enemy stockholders. But nothing in the Act or in public policy precludes avoidance of the delays and expense of litigation by settlement; indeed the law favors set-

tlements. Moreover, while the power to settle is not restricted by the limitations on administrative returns, it is suggestive that even an administrative return may be made to a corporation 49% of whose stockholders are enemies (Section 32(a)(2)).

For convenience in exposition we shall discuss first the two issues which involve corporation and trading-with-the-enemy law—whether a corporation has any cause of action on behalf of some, but not all, of its stockholders (Point I), and whether stockholders have any legally recognizable interest in the assets vested from their corporation (Point II). In the light of that discussion, we shall then consider whether Rule 24 gives petitioners any right to intervene in this action (Point III). Finally, we shall deal with the special problems presented by their attempt to enjoin a settlement (Point IV).

I

The Corporation Has No Right or Duty to Press a Claim for Its Nonenemy Stockholders

Petitioners are seeking recovery for themselves and other nonenemy stockholders of a share of the vested corporate assets equal to the percentage of stock held by the nonenemies. They take the position that the corporation has the duty to bring such a suit and that, since it has failed to do so, they may intervene in the corporate right to perform the corporation's duty. We submit that there is no such corporate duty and that therefore peti-

tioners are not entitled to intervene to require it to be performed.

The proposed complaint alleges that plaintiff is entitled to a share of the assets proportionate to "the interests in plaintiff held by non-enemies." This portion is "to be returned to plaintiff for all proper corporate purposes, only excluding from the benefits thereof all interests ineligible to participate therein under the Trading with the Enemy Act" (R. 49-50). By persons "ineligible to participate," the complaint means enemy stockholders (R. 52); only the nonenemy stockholders are "eligible" (R. 53, 58, 59, 60, 62). The prayer is that the proceeds of the action be applied first "to the benefit of plaintiff's non-enemy shareholders, to the extent of their full interest in plaintiff" (R. 67). And in their brief petitioners explain that the judgment they seek would take the form of a return "to the corporate entity" of the proportionate non-enemy share, upon condition that the corporation submit a "plan" for limiting the benefits of the recovery to the nonenemy stockholders. This plan "might involve the creation of a preferred stock or debentures issuable to the non-enemy stockholders to the extent of their interest in the recovered assets," or a "liquidating dividend." If the corporation refused to submit such a "plan," the stockholders could do so or "the court might then order distribution directly to the non-enemy stockholders" (Pet. Br. pp. 42-3). Since the interest and

right which is thus being asserted is that of the nonenemy stockholders and the recovery is to go to them, it would seem only natural that those stockholders and not the corporation be the plaintiff. See Glenn, *The Stockholder's Suit—Corporate and Individual Grievances* (1924), 33 Yale L. J. 580, 582, 584, 588.

Why, then, do petitioners insist upon the corporate right of return, the corporate duty to sue, and intervention in the corporate right (Brief, pp. 4, 14, 15, 39, 45, 48)? The motive lies in their admission (Brief, p. 44) that if it is held that the corporation is not the proper party to sue for the nonenemy stockholders, and that the stockholders must sue on their own behalf, the stockholders whom petitioners seek to represent may be barred by limitations and by failure to file administrative claims pursuant to Section 33 of the Act (Appendix p. 61, *infra*).[3] The petitioners seek to create a new right to evade the running of limitations upon another right.

It is true that substantially no nonenemy stockholders in the plaintiff have filed an administrative

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[3] The Custodian does not concede that limitations have not run even if the corporation is the proper claimant for the nonenemy stockholders. The corporation neither filed a claim nor pleaded a cause on behalf of individual stockholders. Petitioners expect (Brief, p. 44), however, that this conclusion will not appear so clearly to the courts as would the plain fact that individual stockholders, not having filed a claim or brought a suit on their own behalf, may not do so after the permitted time has passed.

claim or brought suit under the Trading with the Enemy Act,[4] and that the time within which they may do so under Section 33 has run out. But petitioners themselves are not in this position of being barred by limitations. Admittedly conscious of the running of time, they filed a claim and brought suit in the district court in New York, both within the time prescribed by the statute (R. 32, 83-6, Brief, p. 11). Their concern over limitations thus stems from a solicitude for the other nonenemy stockholders who were not so diligent. These other nonenemy stockholders, incidentally, have slept for at least four years, having learned of their rights, according to petitioners (Brief, pp. 17-19, 44), on December 8, 1947, when this Court decided

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[4] Indeed, the nonenemy stockholders in all the corporations whose assets have been vested have paid scant attention to any possible "interest" they may have in the vested assets. Only three suits, in addition to petitioners' suit in New York, have been filed. Fritz von Opel, asserting a share interest in Uebersee Finanz-Korp., has brought suit in the Southern District of New York and in the District of Columbia. *Fritz von Opel* v. *McGrath*, S.D.N.Y. Civ. 50-70; *von Opel* v. *Clark*, D.D.C. Civ. Action No. 1910-49; *von Opel* v. *Clark*, D.D.C. Civ. Action No. 1923-49. In two other cases, the corporations involved did not file suit, and a nonenemy stockholder in each of them has sought to raise directly his alleged right to an aliquot share of the corporate assets. *Bank Waedenswil* v. *McGrath*, D.D.C. Civ. Action No. 1902-49; *Theising* v. *McGrath*, D.D.C., Civ. Action No. 1903-49.

With the exception of Uebersee Finanz-Korporation (see No. 178, this Term), no corporation, of all those whose assets have been vested, has filed a claim or brought suit raising a question of a right to a return of an interest proportionate to its nonenemy stockholdings, whether for the benefit of the corporation or the nonenemies. Uebersee's claim is really not for partial but for total recovery. See respondent's brief in No. 178, pp. 60-1.

Clark v. *Uebersee Finanz-Korp.*, 332 U. S. 480. But even if those others who failed to file and sue were deserving of sympathy, nothing is plainer than that the corporation cannot be made into their plaintiff in order to circumvent for them the statute of limitations.

In support of their theory that the corporation has the duty to sue on behalf of the nonenemy stockholders, petitioners urge (Brief, pp. 41, 43) that a contrary conclusion would mean a "multitude" of individual suits. This is at most an argument of convenience and not of law; it is, moreover, not well grounded even as a matter of convenience. The fact is that no stockholder of plaintiff corporation other than petitioners has filed suit and only four suits, including petitioners' suit in New York, have been brought by stockholders in all the corporations whose assets have been vested (see p. 13, n. 4, *supra*). And, in any event, the issues in such suits would not be common to the various plaintiffs. Aside from the common issue of law basic to all of them, an issue capable of decision once for all, the "multitude" of suits will each present the issue of the enemy taint of the individual stockholder-plaintiff. It will be far better that these different, factual issues be heard separately.

According to the petitioners, it is only the men who dominate this corporation and own a majority of its stock and refuse to admit that they are enemies, who prevent the corporation from doing

its "fiduciary duty" and suing for the benefit of the nonenemy stockholders. Yet petitioner would impose this duty to sue even if the majority believe in good faith that they and the corporation are not enemies and that suit should be brought for return of all the property. Were the corporation required to sue both for itself for all the property, and for its nonenemy stockholders for part, the resulting dual loyalties would affect the daily conduct of the lawsuit. When settlement came up for consideration, as is the case here, the separate duties would squarely conflict and put the corporation in an impossible position.

It is no answer that persons such as petitioners are glad to intervene and relieve the corporation of its "fiduciary duty" to sue for the nonenemies. Such a duty cannot exist and there is no occasion for intervention to perform it. No corporation can owe a duty to a few of its stockholders which conflicts with the duty it owes to all. Petitioners themselves allege that the corporation "has a legal obligation to speak for plaintiff's enemy and nonenemy stockholders alike" (R. 60).

If there is an interest in the stockholders (and we say there is none, see pp. 20-36, *infra*), it must be asserted by them in their own name and behalf and not through the corporation as their agent or representative. Section 9(a) of the Trading with the Enemy Act requires suit by the real party in interest. Thus, it has been held that an Ameri-

can trustee of a fund established by a German company has no standing vicariously to assert the interests of American creditors of the German company; the creditors have their own remedy under the Act. *Farmers Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 850 (C.A. 2), certiorari denied, 269 U.S. 583. And a bailee may not assert the rights of the owner of vested property. *Nagano* v. *Clark*, 85 F. Supp. 368, 374 (N.D. Ill.), reversed on other grounds, 187 F. 2d 753 (C.A. 7). Similarly, the holder of a bare record title who has no beneficial interest has no interest in the property capable of being recovered in a suit against the Custodian. *Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937; *Standard Oil Co., N. J.* v. *Markham*, 64 F. Supp. 656, 666 (S.D.N.Y.), affirmed, 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U.S. 873. *Central Hanover Bank & Trust Co.* v. *Markham*, 68 F. Supp. 829 (S.D.N.Y.).[5]

[5] These decisions apply to litigation under the Trading with the Enemy Act the general rule that the proper plaintiff is the person who will benefit from the suit. *McMicken* v. *United States*, 97 U.S. 204, 208. And to determine the "real party in interest" the courts will look to the substance of the matter. *Heiskell* v. *Mozie*, 82 F. 2d 861, 863 (C.A. D.C.). A situation analogous to the instant case is presented when a corporation seeks to sue for a refund of taxes erroneously assessed on a distribution of capital. Since the recovery is destined for the stockholders, it is they and not the corporation who are the proper plaintiffs and must bring the suit. *Sharp & Dohme* v. *United States*, 144 F. 2d 456 (C.A. 3). Cf. *Turks Head Club* v. *Broderick*, 166 F. 2d 877 (C.A. 1); *Royce* v. *Squire*, 168 F. 2d 250 (C.A. 9). Conversely, when the relief sought is entirely a corporate benefit, such as exemption from a regulatory action, the stockholder has been denied status as plaintiff. *Schenley Corp.* v. *United States*, 326 U.S. 432; *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U.S. 479.

This Court has decisively applied the real-party-in-interest rule to the Trading with the Enemy Act. In *Silesian American Corp.* v. *Clark*, 332 U.S. 469, a corporation attempted to assert under the Act an alleged interest of its stockholders. The attempt was rebuffed by a unanimous court in an opinion by Mr. Justice Reed, who wrote (332 U.S. at 474):

> It was held by the Circuit Court of Appeals that Silesian had no "standing vicariously" to assert the interests of its shareholders. We agree. Silesian has no legal interest in the issue as to the ownership of its stock.

Just as a corporation has no standing to assert rights of some of its stockholders' pledgees against the Custodian, it has no standing to assert the rights of some of its stockholders against the Custodian. This is so, even if the rights of the stockholders are not in derogation of the corporation's rights. It is doubly improper to suggest that the corporation be plaintiff, where, as here, the non-enemy stockholders' claim is in conflict with the claim of the corporation and with the interests of the other, enemy stockholders.

The square conflict between the petitioners' claim and that of the corporation is demonstrable by the pleadings filed on behalf of the two. By Section 9(a) "any person not an enemy" may bring a suit. Since the section embodies the consent of the United States to be sued, a clear allegation that a plaintiff is a nonenemy is jurisdictional.

Garvin v. *Kogler*, 272 Fed. 442 (C.A. 3). The plaintiff corporation has complied with the statutory requirement by unqualifiedly alleging that it is not an enemy, an ally of an enemy, nor a national of a designated enemy country (R. 2; see *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482). Petitioners must plead similarly, for where a corporation has a right to sue, under the Trading with the Enemy Act (as elsewhere) "a stockholder suing in its right, is in no better position." *Stoehr* v. *Wallace*, 255 U.S. 239, 251. Petitioners are fully appreciative of the necessity that the corporation must unqualifiedly plead its nonenemy status (R. 49; Brief, pp. 5, 40, n. 18). And they are quite capable of pleading plainly that they, individually, are not enemies (R. 48[6]). Yet, they carefully qualify their allegation of the corporation's status. They allege that the plaintiff corporation "is not now and has not been" an enemy "at least to the extent that the plaintiff represents non-enemy interests, that is to say, at least to the extent plaintiff has been, since December 6, 1941, and is now owned by non-enemies" (R. 48, para. 3). This

[6] "Intervenors are residents of the City, County and State of New York and are now and have been at all times since December 6, 1941, non-enemies. The term 'enemy' as used in this complaint means enemies, enemy nationals, allies of enemies, nationals of allies of enemies, nationals of a designated enemy country, or nationals of Germany or Japan, within the meaning of the Trading With the Enemy Act, as amended, and corporations or other persons directly or indirectly owned or controlled by or affiliated with an 'enemy', and the term 'non-enemy' means the absence of such status." (R. 48, para. 2).

is an allegation that the corporation is partly enemy. It is thus contradictory of the corporation's own allegation. We do not offer this point so much to show that petitioners' complaint in the corporate right is subject to a motion to dismiss as admitting that the corporation is an enemy,[1] but rather to show that petitioners' position is contrary to that of the corporation. As such, it cannot be presented by the petitioners in the corporate right.

The essence of the matter is that the corporation's cause of action to recover all the property for the benefit of the corporation (and indirectly for all the stockholders), is plainly contradictory of the petitioners' cause of action for part of the property for the benefit of only the nonenemy stockholders. The cause on behalf of the corporation rests on the proposition that the corporation is not an enemy. The cause on behalf of the nonenemy stockholders rests on the proposition that the corporation is an enemy and goes on to allege that individual stockholders are not enemies and have a legal interest. The corporation can prosecute only the cause for its behalf; the stockholders must prosecute the cause for their behalf, as the petitioners have done in New York.

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[1] This is, however, the case. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482; *Garvin* v. *Kogler*, 272 Fed. 442 (C.A. 3); *Rothschild* v. *Chemacid Societe Anonyme*, 266 App. Div. 1017, 267 App. Div. 773, 44 N.Y.S. 2d 689 (2d Dept.).

II

Petitioners, Stockholders in Plaintiff Corporation, Have No Legally Recognizable Interest in the Assets Which Have Been Vested from the Corporation

We have shown that the nonenemy stockholders must themselves bring suit for any interest they would seek. We submit, moreover, that they have no interest in the assets which could be recovered, whether by intervention or by separate suit.

At the time of the vesting in 1942, the property in issue was on the face of things the property of the corporation. The vesting was intended to, and did take the property "as completely as though by conveyance." *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 56; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120. Nowhere in the situation existing at the time of vesting or thereafter was there room for interposition of persons such as petitioners, minority stockholders in the corporation. While Section 9(a) (Appendix p. 54, *infra*) broadly authorizes suits for "any interest,"[8] an

[8] Since the "interests" for which suit may be brought are all-inclusive there can be no constitutional question, for if petitioners have an interest in the vested property, the Act gives them a full and adequate remedy. The Act is designed "to give to citizens and alien friends an adequate remedy for invasions of their property rights." *Becker Co.* v. *Cummings*, 296 U.S. 74, 81; see *Stoehr* v. *Wallace*, 255 U.S. 239, 243, 246. Petitioners' argument from the Constitution (Brief, pp. 13-14, 25, 37-8) begs the question whether their alleged interest is one which is entitled to constitutional protection and merely asserts that property interests are entitled to such protection. The question is, of course, whether petitioners have a property interest.

interest must exist before it can be recovered. This the petitioners do not have.

It is elementary law that stockholders, majority or minority, do not own the assets of the corporation or have any "interest" in them. "The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members." *Klein* v. *Board of Supervisors*, 282 U.S. 19, 24. The rights of stockholders are limited to a right to dividends and to a share on dissolution, but they do not in any way own the corporate assets during the existence of the corporation. *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69; *Van Allen* v. *The Assessors*, 3 Wall. 573, 584.

So a stockholder, though he be the sole stockholder, may not sue for or recover any property or interest, the title or ownership of which is in the corporation. *Green* v. *Victor Talking Mach. Co.*, 24 F. 2d 378 (C.A. 2), certiorari denied, 278 U.S. 602; *Hill* v. *Fidelity & Deposit Co. of Maryland*, 44 F. 2d 624 (N.D. Ga.); *Brannan* v. *Kelley*, 83 Ind. App. 250, 148 N.E. 157; *Button* v. *Hoffman*, 61 Wis. 20, 20 N.W. 667; *In re Condemnation of Land for Spring Valley Park*, 57 S.W. 2d 752, 754 (Mo. App.); 13 Fletcher, *Cyclopedia of Corporations* (Perm. Ed.) Secs. 5923, 5926.

Petitioners, in presenting their case for an interest in the stockholders, first seek to give the impression that the Custodian's allegations are directed exclusively to the enemy character of the

majority stockholders in the plaintiff and that the case thus turns on a distinction between the majority enemy stockholders and the minority nonenemies (Pet. Br. pp. 3, 5-6, 7, 12, 15, 17). This is not the case. Among the reasons for vesting was that the vested property was found to be owned or controlled by I. G. Farben, a German corporation. Vesting Order No. 907, 8 F.R. 2453. Plaintiff has alleged in its complaint that it is not an enemy and that it was the owner of the property for which suit is brought. The Custodian's answer denies both allegations and thus raises both the issues of plaintiff's ownership of the property and plaintiff's enemy status (R. 16, pars. 3, 4; R. 2, pars. 3, 4). The Custodian, in addition, affirmatively alleges that the plaintiff has conspired with I. G. Farben and others to cloak Farben's property in many countries of the world (R. 28-30). The evidence will go to the issues whether plaintiff owned the vested property and whether plaintiff is an enemy or enemy-tainted by reason of enemy control, enemy ownership of its stock or enemy affiliation of its management and directors, or by reason of having done business within several enemy and enemy-occupied countries,[9] or by reason of its having engaged in a world-wide conspiracy to cloak the assets of I. G. Farben.

[9] Petitioners are incorrect in their statement (Brief, p. 15) that there is no question "presented by any of the pleadings in this case now before the Court whether I. G. Chemie did busi-

Having sought to frame the case as a question of the relative virtue of enemy and nonenemy stockholders, petitioners would go on (Brief, pp. 36 *et seq.*) to have the Court believe that a vesting of corporate assets, without regard to the "rights" of nonenemy, nontainted stockholders, is a novel and somewhat shocking thing. The fact is that the Act has always contemplated such consequences. Section 2(a) of the Act (Appendix, p. 53, *infra*), since it was first enacted in 1917, has provided for the vesting of all the American property of a foreign corporation which merely does business within enemy territory, whatever its place of incorporation or the composition of its body of stockholders. It could hardly be suggested that where a neutral corporation becomes an enemy by doing branch business both in the United States and in Germany, its nonenemy stockholders have a right to a share of the United States assets vested from the corporation. Cf. *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42; *Swiss National Insurance Co.* v. *Crowley*, 136 F. 2d 265 (C.A. D.C.), certiorari denied, 320 U.S. 763. Nor could it be suggested that the nonenemy individual stockholders have rights in assets vested

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ness within enemy territory." Paragraph 3 of the first count of Chemie's complaint (R. 2), as denied by defendants' answer (R. 16), squarely puts in issue the question whether plaintiff is a company resident outside the United States and doing business within the territory of any nation with which the United States is at war, within the meaning of Section 2(a) of the Trading with the Enemy Act. (Appendix, p. 53, *infra*.)

from a corporation whose management has in fact gone over to the enemy and is using the assets to wage war against us. Cf. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480. We submit there is equal ground for vesting and retaining the property of corporations which are enemy tainted for whatever reason, whether it be that they are incorporated in Germany, that they do business there, or that they are controlled by the enemy in fact or by virtue of 50% enemy stock ownership.[10]

In all these cases the owner is a real enemy. His property is capable of being used against us, and the purposes of the Act require its vesting. *Clark* v. *Uebersee Finanz-Korp., supra; Josephberg* v. *Markham*, 152 F. 2d 644, 648 (C.A. 2); *Koehler* v. *Clark*, 170 F. 2d 779 (C.A. 9). Neutral

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[10] It is a valid inference that 50% of stockholders in a corporation exercise control. Cf. Sec. 32(a)(2)(E), Trading with the Enemy Act, Appendix, p. 60, *infra*. Corporations have been constitutionally subjected to consequences because of majority stockholding by aliens. A number of states prohibit, upon pain of escheat, the ownership of land by aliens or by corporations in which aliens own 50% or, in some cases, 20% of the stock. E.g., Constitution of Washington, Art. II, sec. 33 (50%); Cal. Gen. Laws (1945), Art. 261, Secs. 3, 7, 8 (50%); D. C. Code (1945), § 45-1503.4 (50%); Minn. Stat. Ann. (1947), Sec. 500.22 (20%); see 1 Powell, *Real Property* (1949), Sec. 108. Such prohibitions are constitutional. *Frick* v. *Webb*, 263 U.S. 326. But cf. *Sei Fujii* v. *State*, 217 P. 2d 481, rehearing denied, 218 P. 2d 595 (Cal. App.). These provisions prohibit the ownership of land by any corporation the majority of whose stock is held by aliens, though at the time the land was acquired a majority of the stock was held by citizens. *State* v. *Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574.

See also Communications Act of 1934, 48 Stat. 1086, 47 U.S.C. secs. 222(d), 310, denying licenses to corporations having more than 20 percent alien ownership.

or American minority stockholders of course suffer financial harm when the corporate assets are vested as those of an enemy. As investors, they must accept the consequences of losses by the corporation. *Anderson* v. *Abbott,* 321 U.S. 349, 361; *Marr* v. *Tumulty,* 256 N.Y. 15, 24, 175 N.E. 356, 358. If petitioners' position were accepted, whenever a corporation suffers a loss by a fine or a forfeiture, or whenever double liability is imposed on bank shares, stockholders with no influence in the management would be entitled to a refund of proportionate shares of the amount involved.

The Custodian is said by petitioners (Brief, pp. 25-6) to be inexplicably inconsistent in vesting only the enemy stock interest in American corporations while vesting all the assets of neutral companies whose only fault has been that a part of their stock is owned by enemies. There has never been a vesting of assets of a neutral company on this ground alone. In every case there have been other features of enemy taint such as direct enemy control of the management or direct cloaking of the vested property by the neutral for the enemy. Where enemy ownership of stock exists, the Custodian vests if he believes the enemy stock interest to be controlling in fact, or because it is 50% or more of the total. Indeed, the Custodian recently released from freezing and determined not to vest assets of a Swiss corporation 49% of

the stock of which was owned by enemies, because, he concluded, the enemy stockholders did not in fact control the corporation.

No cases pass on the precise question of whether stockholders have an interest in corporate property vested as that of an enemy. The question of interests in such stockholders has, however, arisen in the law of prize and abroad, in circumstances similar to the present case. It has consistently been decided against the stockholders.

In the law of prize, closely related to the Trading with the Enemy Act (*Stoehr* v. *Wallace*, 269 Fed. 827, 840-1 (S.D.N.Y.), aff'd. 255 U.S. 239, 242), it is settled that stockholders, though nonhostile, have no rights in seized property. *The Pedro*, 175 U.S. 354, 367; *Steamship "Marie Glaeser,"* 1 Lloyd's Prize Cases 56 (1914). Since the decision of the House of Lords in *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916] 2 A.C. 307, the British courts, in determining enemy character, have looked through the corporate form to the underlying realities, as this Court did, albeit in a broader fashion, in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480. Yet the House of Lords in the *Daimler* case recognized that stockholders have no property in the assets of the corporation. [1916] 2 A.C. at 338, 340; see *The Noordam* (No. 2), [1919] P. 255, 259, affirmed [1920] A.C. 904. And the principle remains firm that nonenemy stockholders of an enemy corporation have no rights when a ship owned by the corporation is seized in prize. In

my opinion, there is no authority for applying the principle of the *Daimler* case in favour of claimants in prize; though it is clearly applicable in favour of the Crown (*The Glenroy* [[1945] A.C. 137]). Moreover, it seems to me that it would be contrary to settled principle to do so." Lord Merriman, in *The Unitas* [1948] P. 205, 219, affirmed [1950] 2 A.C. 536. See also, *The Noordam* (No. 2), *supra*.

A case strikingly similar to the instant one was decided by the Court of Appeal a week after the decision of the House of Lords in *Daimler*. The Court ordered a ship owned by a British company forfeit to the Crown under the Merchant Shipping Act as improperly registered as British, for the reason that the company was dominated by its majority stockholders in Germany. *The Polzeath* [1916] P. 241, affirming [1916] P. 117. Swinfen Eady, L.J., wrote as follows of a petition filed by British minority stockholders ([1916] P. at 256):

> In my opinion the British shareholders are not entitled to intervene. It is suggested that the ship should be appraised, and that payment should be made to the British shareholders in proportion to their holdings. The Court has no such power; it cannot administer the affairs of the company. If any hardship is caused to innocent shareholders by the declaration of forfeiture their position is that they can only appeal to the merciful consideration of the Crown. The order giving them leave to intervene must be discharged.

A leading case in international arbitration has held explicitly against the rights of stockholders in a case analogous to that presented here. Under the Treaty of Versailles a quantity of German shipping was to be transferred to the Reparations Commission. The Commission laid claim to oil tankers owned by a German corporation whose sole stockholder was the Standard Oil Company, an American corporation. The United States took up the claim of Standard Oil and together with the Commission submitted the controversy to an Arbitral Tribunal. The Tribunal held for the Commission on the ground that not even the sole stockholder of the German corporation had any rights in the corporate assets. The American arbiter dissented, but only on the ground that the terms of reference were not intended to limit the question to the legal interest of Standard Oil as a stockholder and permitted a decision for Standard Oil if it had the "economic interest" in the tankers. *Standard Oil Tankers Case, Arbitration Award,* Aug. 5, 1926, 2 Foreign Relations of the United States, 1926, p. 166. Similar decisions have been made by the highest court of France.[11]

Petitioners rely upon two cases, *Standard Oil Co.* v. *Clark,* 163 F. 2d 917 (C.A. 2), certiorari de-

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[11] *Pellerin et Orosdi* contre *Ministère Public et Laforge*, November 14, 1923, Gazette du Palais, 1924, p. 172, Journal du Droit International, 1924, p. 1013; *Wilkens* contre *Lagarde et Procureur de la République près le tribunal de Papeete*, June 21, 1926, Sirey, 1926, I, 268; Annual Digest of International Law Cases, 1925-1926, p. 466. The first cited case involved a claim by French stockholders of a German corporation whose

nied, 333 U.S. 873 (Brief, pp. 21-4) and *Clark* v. *Uebersee Finanz-Kôrp.*, 332 U.S. 480 (Brief, pp. 17-20).

In *Standard Oil* the Court of Appeals (at p. 926) considered whether, if Standard Oil Co. were a foreign national "to the extent" it had been acting for I. G. Farben, pursuant to the definition of "national" in Executive Order No. 8785,[12] it would then be barred by Section 5(b) of the Act from bringing a suit under Section 9(a) for return of other assets owned by it, and not being cloaked. The case presented no issue of separability of interests in assets of a corporation according to the enemy character of its stockholders or the right of a stockholder to recover corporate property.

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assets in France had been seized as enemy property under the French equivalent of the Trading with the Enemy Act. The Court of Cassation rejected the claim on the ground that so long as the corporation existed, its stockholders had no fixed or enforceable right in its property. In the second cited case that court on the same ground denied a claim of an American stockholder to a proportionate share of the assets of a German corporation seized as enemy property.

The Austro-Yugoslav Mixed Arbitral Tribunal has ruled similarly, in a case in which the claimants were two Austrian banks which owned two-thirds of the stock of a German corporation, the property of which was expropriated by the Yugoslav government. *Oesterreichische Credit-Anstalt et al., claimants* v. *Yugoslav Government*, September 8, 1927, Austro-Yugoslav Mixed Arbitral Tribunal, Recueil des Décisions des Tribunaux Arbitraux Mixtes, VII, p. 794.

[12] "The term 'national' shall include,

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"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country (Executive Order No. 8785, June 14, 1941, 6 F.R. 2897).

Petitioners place a good deal of reliance (Brief, pp. 17-20) upon the Court's opinion in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, and particularly upon the concluding paragraph of the opinion. In that paragraph (332 U.S. at 489), set out in the footnote,[13] Mr. Justice Douglas stated some of the questions, not being decided, which were raised by the expansion of the definition of enemy accomplished by that decision. Petitioners refer particularly (Brief, p. 19) to the question as to "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears." All the questions raised were left to "legislative or judicial clarification" and at the word "legislative" there is appended in the footnote a reference to Section 32(a)(2)(E) of the Act, which permits a return to a corporation

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[13] It is suggested, however, that this approach [the expansion of the definition of "enemy"] may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative [9] or judicial clarification.

[9] See 60 Stat. 50, adding §32(a)(2)(E) to the Act.

when 50 percent or more of the stock is owned by nonenemies and the corporation is not enemy controlled. It may well be that the 50-percent rule of Section 32(a)(2)(E), which is followed by the Custodian in his vesting actions, will be regarded as a legislative view of another of the questions stated in *Uebersee*—"the extent of holdings necessary to constitute enemy taint." The scheme and details of Section 32 provide legislative clarification of the proposition, relevant here, that nonenemy stockholders can have no rights in vested corporate assets.

As a first principle, Section 32(a)(1) provides that no return shall be made except to "the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian," or to the legal representatives or successors in interest of such owners (Appendix, p. 57, *infra*). The substantially identical language in Section 9(b),[14] applicable to returns of property seized in World War I, was held limited to "those whose interest in the seized thing amounted to ownership, as that term has been understood and defined." *Richmers Rhederei Actien Gesellschaft* v. *Sutherland*, 23 F. 2d 989, 991 (C.A.D.C.), certiorari denied, 276 U.S. 632. A stockholder of course does not have such an interest in the seized corporate property.

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[14] "the owner . . . [of the money or other property] at the time such money or other property was required to be so conveyed . . . to the Alien Property Custodian." Sec. 9(b), 41 Stat. 977, 50 U.S.C. App. Sec. 9(b).

Section 32 goes on, in subdivision (a)(2)(B), to provide for a return to stockholders in an enemy corporation, but only in the case where the stockholders are American and own 100 percent of the shares of the enemy corporation. The limitation of returns to stockholders to such a case was deliberate. See S. Rep. 920, 79th Cong., 2d Sess., p. 4; H. Rep. 1269, 79th Cong., 1st Sess., p. 4. In singling out this situation for a grant of rights to stockholders, the Congress clearly implied that stockholders holding less than 100 percent are to be left without rights. Congress did not overlook the economic loss to friendly minority stockholders. To date it has chosen to mitigate that loss only by providing in Section 32(a)(2)(E) for a return to a neutral corporation when less than 50 percent of the stock is held by enemies. And that return is to be made to the corporation.

Confirmation of Congress' view that minority stockholders have no rights appears from congressional action since the enactment of Section 32. The 81st Congress enacted a private bill, H. R. 8422, directing the return of 30 percent of the assets of two Honduran corporations to one Countess von Plettenberg who owned 30 percent of the stock of the corporations and who was personally eligible for a return of her own property under Section 32(a)(2)(D), Appendix, p. 59, *infra*. See H. Rep. 2157, S. Rep. 1526, 81st Cong., 2d Sess. The President vetoed the bill on June 23, 1950,

returning it with a statement that although he was in sympathy with its objective, the problem presented by the case should be solved by general legislation giving relief to others in the same plight. H. Doc. 628, 81st Cong., 2d Sess. Petitioners argue (Brief, p. 30) that by this veto the President "formally approved" the "right" of return to stockholders. If anything, both the President's veto message and the bill itself are a "formal" approval that no right of return exists in the absence of new legislation, whether a private bill or general amendment.[15]

Since the veto of H. R. 8422 various bills to give general relief to friendly minority stockholders were introduced and considered in the 81st and 82d Congresses. One of these, S. 3901,

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[15] Like comment could be made of the international agreements which, petitioners urge (Brief, pp. 26-29, 34-5), show the policy of the Department of State to protect American stockholder interests in vested assets. These agreements recognize that the "policy" they express is understood to be a grant of rights not otherwise effective. Maurer, *Protection of Non-Enemy Interests in Enemy External Assets*, 16 Law & Contem. Prob., 407, 422 (1951). Both agreements cited are inapplicable to this case. The Brussels Agreement of 1947, to which Switzerland is not a party, provides explicitly that it shall confer no justiciable rights and, incidentally, exempts the assets involved in the case now before this Court from even its internationally operative effect. Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, Brussels, December 5, 1947, H. Rep. 2770, 81st Cong., 2d Sess., p. 17, at p. 26 (Annex, Art. 33), p. 18 (U. S. reservation). The other agreement cited by the petitioners, the Washington Accord of 1946, relates only to assets in Switzerland. Art. I, Sec. 1, 14 State Dept. Bul. 1121 (1946). An agreement between Switzerland and this Government on intercustodial conflicts which would affect assets in the United States has been under discussion for some time.

was reported favorably by the Senate Committee on the Judiciary and was passed by the Senate on July 26, 1950. S. Rep. 2051, 81st Cong., 2d Sess.; 96 Cong. Rec. 11067-8. A companion bill, H. R. 8998, was with S. 3901 the subject of hearings before a House subcommittee, which were not completed when the 81st Congress adjourned. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., on various bills including H. R. 8998 and S. 3901, 81st Cong., 2d Sess., pp. 365-411. In the 82nd Congress, four bills for the relief of minority stockholders had been introduced and incomplete hearings on two of them were held in October, 1951. H. R. 133, H. R. 2263, H. R. 4284, S. 2339, 82d Cong., 1st Sess.; MSSHearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on various bills including H. R. 2263 and H. R. 4284, October 18-20, 1951, 82d Cong., 1st Sess.

As these bills illustrate, any grant of relief to minority stockholders presents problems most difficult of satisfactory solution by the courts. At the outset, there is the practical problem of providing the minority stockholders who are to have rights with sufficient time in which to make their claims. The bills under consideration in the present Congress provide for six months or two years from the date of enactment or from the vesting, whichever is later. H. R. 133, H. R. 2263, S. 2339 (2 years); H. R. 4284 (six months). The courts could only

find that such rights exist as of a given time in the past, with the consequence that the already existing period of limitations would bar most plaintiffs. (See pp. 12-14, *supra*.)

Various of the bills suggest desirable safeguards which should accompany the grant of such a novel right of recovery. One of the pending bills (H.R. 4284) requires that the stockholder-claimant have owned his shares continuously since September 1, 1939, thus preventing windfalls to those who purchased from the enemy in anticipation of war. Another (H.R. 133) would limit the stockholder's recovery to the cost to him of his ownership interest. The most recently introduced of these bills (S. 2339) provides that the claimant may be paid only upon a finding that allowance of his claim is consistent with the public interest.[16]

All of the presently pending bills would treat the minority stockholder as secondary to those creditors whose claims are payable under Section 34 of the Act (Appendix, p. 62, *infra*). Were the courts to recognize an ownership interest of minority stockholders in vested corporate assets, the stockholders would have a priority over creditors unheard of in the law, and contrary to the policy of Section 34 of the Act (Appendix, p. 62, *infra*) and of the provision in favor of creditors in Section 32(a)(2)(B), the sole instance in which Congress

[16] Other limitations include requirements that the stockholder be an American and that he must have owned his stock continuously to the date of allowance of his claim.

has directed a return of corporate assets to a stockholder. Still another question is whether minority stockholders should have rights where the corporation is insolvent, taking into account all its creditors, whether eligible for payment under Section 34 or not. One of the pending bills distinguishes between the payments to be made to stockholders in the insolvent corporation and in the solvent corporation. H. R. 4284. Aside from all these difficulties in the administration of an equitable system for relief of minority stockholders, there is the basic question, before the Congress for decision, whether stockholders should have preference over the prisoners of war and the other war-damage claimants who are given first priority on the proceeds of vested enemy property under the War Claims Act of 1948 (50 U.S.C. App. (Supp. III) Secs. 2001-2013, 60 Stat. 1240, as amended).

III

Petitioners Have No Right to Intervene to Present a Cause of Action for a Portion of the Assets

We have shown above that there is here no corporate right or duty and, in addition, that there is no interest upon which suit can be founded. It follows that under Rule 24 of the Federal Rules of Civil Procedure, petitioners have no grounds for intervention.[17]

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[17] Special considerations bearing on petitioners' right to intervene to enjoin a settlement of the action are discussed in Point IV, p. 46, *infra*.

Petitioners have not appealed to the discretionary power of the trial court to order intervention under subdivision (b) of Rule 24 (Appendix, p. 52, *infra*). They neither alleged nor sought to prove, as required by Rule 24(b), that their "claim or defense and the main action have a question of law or fact in common." The district judge, moreover, strongly indicated his views on a possible exercise of his discretionary power when he ruled that he would not construe the Rule as permitting the suit to become "virtually a free-for-all" (R. 76).[18] Petitioners' attempt to intervene must therefore be judged by the standards of Rule 24(a), more particularly by clauses 2 and 3, the only clauses which petitioners have invoked.

Clause 2.—This clause permits intervention when the "representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Petitioners will not be bound by the judgment in the corporation's action against the Custodian, unless they are allowed to become parties. As the Court of Appeals held, "If they have a right to a share of the vested assets, they cannot be deprived of it in a suit to which they are not parties" (R. 80). In *Sutphen Estates, Inc.* v.

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[18] This Court has sharply limited appellate review of a discretionary ruling against intervention. *United States* v. *California Canneries*, 279 U. S. 553, 556; *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U.S. 519, 524; *Pipe Line Co.* v. *United States*, 312 U.S. 502, 506.

United States, No. 25, October Term 1951, the Court rejected a claim of intervention under clause 2, saying (p. 2, slip opinion):

> Appellant, however, is not a privy of Warner; its rights not only do not derive from Warner, they are indeed adverse to Warner. The decree in this case, like that in *Credits Commutation Co.* v. *United States*, 177 U.S. 311, therefore is not *res judicata* of the rights sought to be protected through intervention.

These petitioners, too, are not privy to the corporation; their asserted rights do not derive from the corporation but are rather adverse to those of the corporation.

Petitioners are not privy to the corporation because they are asserting an individual grievance for which they desire compensation. A judgment in a suit by a corporation does not preclude stockholders from thereafter asserting their personal rights. *Rambo* v. *United States*, 117 F. 2d 792 (C.A. 5); *Palmer* v. *Guaranty Trust Co.*, 111 F. 2d 115 (C.A. 2). Thus, a stockholder may not intervene in his corporation's suit in order to assert an individual grievance or to complain in his own right of a wrong to the corporation.

The initial denial and later grant of intervention to a stockholder, recorded in *Pipe Line Co.* v. *United States*, 312 U.S. 502, illustrates the principle. When the stockholder sought to intervene on the strength of his status as stockholder alone—

in his own right—intervention was denied. When he amended his petition to seek intervention in the corporation's right, intervention was granted. *Pipe Line Co.* v. *United States,* 312 U.S. at 508. See *United States* v. *Columbia Gas & Electric Corp.,* 27 F. Supp. 116, 120 (D. Del.), appeal dismissed *sub nom. Missouri-Kansas Pipe Line Co.* v. *United States,* 108 F. 2d 614 (C.A. 3), certiorari denied, 309 U.S. 687. So here, it is appropriate to reject petitioners' effort to intervene in the corporation's right in order to vindicate rights personal to the stockholders.

By petitioners' own allegations, the issues which they seek to raise will not be raised by the corporation in its suit (R. 50-1, 52-3). Indeed, since petitioners' rights are essentially contradictory of the corporation's right (pp. 17-19, *supra*), the corporation could not raise them if it would. In these circumstances, the final judgment in the corporation's case, in the words of this Court in the *Sutphen Estates* case, *supra,* will not be "*res judicata* of the rights sought to be protected through intervention."

Whether an applicant for intervention will be bound by the judgment is ordinarily decided hypothetically, with a view to an independent suit which the applicant may file in the future. Here, however, applicants have already brought an independent suit and its incidents afford proof that they and their independent suit will not be prejudiced by

the judgment in the instant case. Shortly before filing their motion to intervene here, petitioners filed a suit against the Custodian in the District Court for the Southern District of New York. The suit is frankly brought in petitioners' own right as stockholders for their alleged share of the assets. (R. 83-6). Petitioners ask judgment on the basis of their claim that as nonenemy shareholders they "are entitled to their full proportionate share of the property vested in the defendant . . . notwithstanding that Interhandel, A.G. [the corporation], by reason of alleged enemy interest or otherwise, may [in its suit in the District of Columbia] fail to obtain the return of said vested property or may affect a settlement with defendant for some amount less than the fair and true value of the aforesaid vested property (R. 85)." The District Court for the Southern District of New York has held, on a motion to dismiss, that this complaint states a good cause of action. *Kaufman* v. *McGrath*, S.D.N.Y., Civ. No. 56-246, October 5, 1950, without opinion. We think that court was wrong in holding that nonenemy stockholders have such rights, but it remains, as the Court of Appeals below recognized (R. 80), that in prosecuting their New York suit, petitioners will neither be bound nor prejudiced by the judgment here. The only effect of the judgment here can be that any recovery by the corporation in this, its suit, will reduce the alleged damage to petitioners.

Clause 3.—This clause of Rule 24(a) permits intervention when the applicant is "so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

1. Petitioners do not have the required interest in the property in issue. The interest required for intervention as of right, prior to the adoption of the Rule, was that of a recognized interest in a *res*. *United States* v. *California Canneries*, 279 U. S. 553, 556; *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940, 942 (C.A. 4), certiorari denied, 289 U.S. 748; *Vertner* v. *Vertner*, 70 F. 2d 783 (C.A.D.C.); *Board of Commissioners* v. *Bernardin*, 74 F. 2d 809, 815-16 (C.A. 10), certiorari denied, 295 U.S. 731. The Rule generally, and clause 3 specifically, was intended as a codification of the prior principles. *Pipe Line Co.* v. *United States*, 312 U.S. 502, 508; *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del.), appeal dismissed *sub. nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied, 309 U.S. 687. The right to intervene granted by clause 3 must therefore be grounded on a legal or equitable title to a *res*. *Pure Oil Co.* v. *Ross*, 170 F. 2d 651 (C.A. 7); *Gross* v. *Missouri & A. Ry. Co.*, 74 F. Supp. 242, 249 (W. D. Ark.); 4 Moore, *Federal Practice* (2d ed.), Par. 24.09[2].

Professor Moore writes (*ibid.*):

> What kind of an interest must a petitioner have in property subject to the control of a court before he can claim an absolute right to intervene? Obviously it must be an interest known and protected by the law; a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal.

Since petitioners do not have such an interest (Point II, p. 20, *supra*), the requirement of Clause 3 is not met. And even if petitioners did have an interest, the corporation could not be plaintiff for petitioners' interest (Point I, p. 10, *supra*) and thus if the corporation be regarded as the party in whose right intervention is sought, it would lack the interest required under clause 3.

2. Even if petitioners should be held to have an interest capable of recognition, they do not meet the further requirment of clause (3), that applicants for intervention be "adversely affected" by the disposition of the property in the pending action.[19] Three times they have alleged adverse

[19] An applicant may, of course, have a traditional interest in the property in suit and yet not be subject to adverse effect by the disposition which may be made in the suit in which he seeks to intervene. For instance, in *Palmer* v. *Guaranty Trust Co.*, 111 F. 2d 115 (C.A. 2), there was an attempt to intervene in a mortgage foreclosure action by persons who alleged that they had a lien upon the mortgaged assets prior to the lien of the mortgage. The Court of Appeals for the Second Circuit held that even if the claim were valid, a sale under the mortgage would not adversely affect it, because the judgment would preserve all prior liens upon the mortgaged property.

effect as a conclusion of law (R. 53, 62, 66), but they have not attempted to make a showing of adverse effect, as is required under Rule 24(a)(3). *Sutphen Estates, Inc.* v. *United States*, No. 25, October Term 1951, p. 3, slip opinion. They are required to prove "adverse effect" on their own theory of intervention, *i.e.*, that the corporation, and not the stockholder is the proper claimant. However, in their brief (p. 49) petitioners baldly state without amplification that "adverse effect" will follow from a holding that the nonenemy stockholders are the proper claimants for their own interests in their own suit. The statement startles, for, as we have pointed out, the petitioners must show the "adverse effect" necessary for intervention on the assumption that the corporation is the correct claimant. It is, moreover, a *non sequitur* that adverse effect follows from a holding that nonenemies must bring suit on their own behalf. If they must sue for themselves, the outcome of the corporation's suit cannot possibly affect them adversely. The corporation is a stranger to them, in this respect, and petitioners' right to a separate suit continues.

Petitioners offer no reason why a separate suit against the Custodian does not give them an entirely adequate remedy. They have apparently abandoned arguments they have made before.

In the court below, petitioners argued that the adverse effect lay in the possibility that on a settle-

ment or on a defeat of the corporation the Custodian would be free to sell the property and petitioners could not, by an independent suit, immobilize the vested property in the Custodian's hands. They abandoned this argument after we pointed out that by the terms of the statute the filing of every suit under Section 9(a) (Appendix, p. 56, *infra*), including petitioners' suit in New York, operates as a stay of sale of the property sued for until final judgment. *Sielcken-Schwarz* v. *American Factors*, 60 F. 2d 43 (C.A. 2), certiorari denied 287 U. S. 654; *Sigg-Fehr* v. *White*, 285 Fed. 949 (C.A.D.C.); *Standard Oil Co.* v. *Markham*, 57 F. Supp. 332 (S.D.N.Y.); *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S.D.N.Y.). Any person wishing to claim rights under Section 9(a) may sue immediately on the vesting, and thus has "immediate power . . . to impound . . . [the property sued for] 'in the custody' of the Custodian till final decree." *Sielcken-Schwarz* v. *American Factors, supra*, 60 F. 2d at 45.

At one point in the complaint (R. 59) and in their petition for certiorari (p. 13), they speak of the adverse effect on a separate suit of the corporation's removal of the assets from the jurisdiction, after the corporation's suit is over. No removal of assets by the corporation can prejudice petitioners. A removal of all the assets, such as would take place on a final judgment for the plaintiff corporation, would merely undo the vesting and

petitioners would then have no damage, loss, or complaint. A removal of part of the assets, on partial judgment or on an agreed division of the assets in settlement, would *pro tanto* benefit the petitioners, as stockholders in the corporation. Petitioners lose sight of the fact that as stockholders they have no grievance if their corporation regains the property and thereby restores the situation which existed prior to vesting. Petitioners can have rights only to the extent that the vesting is upheld and the corporation fails to recover and thus *cannot* remove the assets.[20] As shown above, any part of the assets remaining with the Custodian after the corporation's suit is disposed of by settlement or judgment, will by Section 9(a) of the Act be frozen in the Custodian's hands to the extent necessary to pay any judgments sought in pending separate suits. Petitioners have an ample remedy by way of a separate suit and are incapable of being adversely affected by the outcome of this suit.

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[20] All but explicitly, petitioners admit that they have rights only in this eventuality. In their complaint in New York, they allege (R. 85):

"Plaintiffs, as shareholders of I. G. Chemie, later known as Interhandel, A.G., are entitled to their full proportionate share of the property vested in the defendant as aforesaid, or to the proceeds of any sale thereof for fair and full value by defendant, *notwithstanding that Interhandel, A.G., by reason of alleged enemy interest or otherwise, may fail to obtain the return of said vested property or may effect a settlement with defendant for some amount less than the fair and true value of the aforesaid vested property.*" [Emphasis added].

IV

Petitioners Have No Cause of Action, and No Right to Intervene, to Enjoin a Settlement of the Action by the Respondents

In their second and third counts and their second and third prayers (R. 57-67), petitioners allege a cause of action for an injunction of a settlement of the action by the respondents.

A settlement is said to be improper and enjoinable on two grounds. First, that it would not impose upon the plaintiff corporation a duty of using the proceeds to pay in full the claims of the nonenemy stockholders (R. 58, Brief, pp. 46-7, 49-50). Second, that it would be illegal under the Trading with the Enemy Act because the proceeds, when paid to the corporation, would be of indirect benefit to the admitted enemies who own 10.9% of the plaintiff corporation's capital stock (R. 58-9, Brief, pp. 46-7, 49-50).

Petitioners' first challenge to the settlement—that it will damage their interest—assumes that they have an interest and that it is in issue on the corporation's suit. We have shown, however, that the corporation owes them no duty to seek to recover on their behalf (Point I, p. 10, *supra*) and that in any event they have no interest to be recovered (Point II, p. 20, *supra*). They may not have intervention to protect rights which are nonexistent. And if they have an interest, they may bring a separate suit to protect it, and need

no injunction in this suit. Petitioners' right to prosecute an independent suit against the Custodian to recover what they believe to be their share of the assets will not be diminished or harmed, whatever the outcome of the corporation's suit (pp. 39-40, 43-45, *supra*), and particularly not by a settlement. A settlement would be *res judicata* of nothing except that the corporation may not have a return to it. Petitioners' rights to a portion of the assets would continue, unchanged by a settlement, except that any sums or assets paid to the corporation in settlement of its claims will lessen, *pro tanto*, the asserted damage to petitioners. In the language of Rule 24(a), they will not be bound by the judgment entered on a settlement here and they will not be adversely affected.

Once petitioners' first ground for attacking a settlement—damage to their property interest—is rejected, their second ground—illegality of a settlement—must fall for lack of standing to raise the point. Petitioners admit that absent a showing of damage, they lack standing. They state that "the nonenemy shareholders might not have the standing to object, if it [the settlement] were not to be at their expense" (Brief, p. 47). As citizens or taxpayers, and aside from any claim of prejudice to their claims, petitioners have no status to sue to enjoin a settlement of a pending action by the Attorney General and the plaintiff corporation. Petitioners, "to have standing in

court, must show an injury or threat to a particular right of their own as distinguished from the public's interest in the administration of the law." They cannot "vindicate any general interest which the public may have in the construction of the Act . . ." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125.

Despite this lack of standing, we do not wish to leave their charge of illegality unanswered. The charge is that a settlement would be illegal because it would be a "return" which, by increasing the corporate resources, would inure to the benefit of the enemy stockholders in the plaintiff. Such a result, petitioners urge, would defeat the purposes of the Trading with the Enemy Act (R. 58-9, Brief, p. 47). The short answer is that a settlement is a far cry from a return. A decision to settle is based on a multitude of factors such as the amount of the offer to settle, the likelihood of victory on trial, the necessary unpredictability of all litigation, and, most important in such cases, the time required for litigation and the desirability of ending Government ownership of the business concern involved in a much shorter period than litigation would require.

Even if such a settlement could be regarded as a return, it would not violate Congressional policy. By Section 32(a) (2) (E) (Appendix, p. 60, *infra*), the Custodian has discretion to make a return to a nonhostile corporation, although as much as 49% of its stock is owned by enemies.

The indirect benefit to the enemy stockholders did not impress the Congress, so long as it was determined by the Custodian that the return would not violate the national interest. A settlement resulting in the same indirect benefit to some enemies is thus not at all beyond the Act's contemplation.

Still other considerations confirm the invalidity of petitioners' counts for an injunction against a settlement. Suits against the Custodian are suits against the United States. *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 118; *Becker Co.* v. *Cummings*, 296 U.S. 74, 78. They must therefore be grounded on a consent by Congress to be sued; "this suit is in effect a suit against the United States and all of its conditions must obtain." *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 603. Nowhere has the United States consented that it, by its Alien Property Custodian, may be sued for an injunction against a proposed settlement of a pending suit.

Any such injunction, moreover, would interfere with the Attorney General in the conduct of the duties of his office. As law officer of the Government and head of the Department of Justice, the Attorney General has full powers to conduct and settle suits by and against the United States. 5 U.S.C. Secs. 291, 309, 310, 316; Executive Order No. 6166, June 10, 1933, Sec. 5, set out at 5 U.S.C. (1946 ed.) Secs. 124-132, p. 101; *Swift & Co.* v. *United States*, 276 U.S. 311, 331; *United States* v. *California*, 332 U.S. 19, 27; *Duncan* v. *United States*,

39 F. Supp. 962, 964 (W.D. Ky.); see 38 Op. Atty. Gen. 98, 100; 38 Op. Atty. Gen. 124, 126.[21] The Attorney General may dismiss suits though harm is thereby caused to others (*Confiscation Cases*, 7 Wall. 454; *Conner* v. *Cornell*, 32 F. 2d 581, 585 (C.A. 8) certiorari denied, 280 U.S. 583). *A fortiori*, he may, with the same result, settle suits.

Petitioners would not only interfere with the right of the Attorney General to settle, out of court, suits brought against him as Custodian. They flout as well the traditional public policy which, favoring amicable settlements, frowns on attempts to impede them. *Kendall* v. *United States*, 7 Wall. 113, 116.

CONCLUSION

Petitioners, stockholders, seek to intervene in order to require plaintiff corporation to assert a cause of action under the Trading with the Enemy Act for return to its nonenemy stockholders of a proportionate share of assets vested from the corporation. No such cause of action can exist. Moreover, under the Act stockholders have no interest in vested corporate assets. In any event, the outcome of this case will in no circumstances bind or prejudice nonenemy stockholders in asserting, in suits against the Custodian, any separate inter-

[21] Even before the Attorney General became the Alien Property Custodian, he had by Executive Order the duty of supervising the Alien Property Custodian's litigation. Executive Order No. 9142, April 21, 1942, Sec. 5, 7 F.R. 2985; Executive Order No. 9788, October 14, 1946, Sec. 1, 11 F.R. 11981.

est they may have in the vested assets. For these reasons and others, they may not require the corporation to assert the desired cause of action, and they have no right to an injunction against a settlement of this action. Accordingly, they have no right to intervene under Federal Rule 24(a) and the judgment should be affirmed.

Respectfully submitted,

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DECEMBER, 1951.

APPENDIX

Rule 24 of the Federal Rules of Civil Procedure (28 U.S.C. foll. Sec. 723(c)) provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will

unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

Pertinent provisions of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*, provide as follows:

SEC. 2. . . .

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * * *

SEC. 7. . . . .

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

SEC. 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid

to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so estab-

lished the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States of the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * *

SEC. 16. Offenses; punishment; forfeitures of property. Whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds,

securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

* * * * * *

SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successors in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, or not—

(A) the Government of Germany, Japan, Bulgaria, Hungary, or Rumania; or

(B) a corporation or association organized under the laws of such nation: *Provided,* That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be re-

turned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof) and if such ownership was by one or more citizens of the United States or by one or more corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further*, That such owner or owners shall succeed to those obligations limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of Italy or of any nation with which the United States has not at any time since December 7, 1941, been at war: *Provided*, That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree, or regula-

tion of such nation discriminating against political, racial, or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided,* That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further,* That, notwithstanding the provisions of subdivision (C) and of this subdivision, return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to September 29, 1950, if such individual would have been a citizen of the United States at all times since

December 7, 1941, but for such marriage: *And provided further,* That the aggregate value of returns made pursuant to the foregoing proviso shall not exceed $5,000,000; and in making returns under such proviso the Alien Property Custodian shall to the extent practicable make such returns in the order in which notices of claims therefor were received and may return any property or interest if the value thereof, taken together with the aggregate value of property and interests already returned pursuant to such proviso, does not exceed $5,000,000; or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided,* That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section; and

(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held

or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89-96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942, or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

(5) that such return is in the interest of the United States.

* * * * * *

SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later.

No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32 (a) hereof.

SEC. 34.

(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40

Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States, and who have not during the war been interned or paroled pursuant to the Alien Enemy Act; and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien

Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty

days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and

the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him; any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter

judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of Title 31, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payment in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United

States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided,* that no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of

such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 172.

ERIC G. KAUFMAN AND AENNI C. KAUFMAN, *Petitioners*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents*.

BRIEF FOR RESPONDENT SOCIETE INTERNATIONALE POUR PARTICIPATIONS, ETC.

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SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents*.

BRIEF FOR RESPONDENT SOCIETE INTERNATIONALE POUR PARTICIPATIONS, ETC.

STATEMENT.

This respondent, a Swiss corporation, on October 21, 1948, filed an action in the District Court at Washington, D. C. under Section 9(a)[1] of the Trading With the Enemy Act against the appropriate government officials to recover property vested by the Alien Property Custodian. (R. 1). This property consists of cash and about 93% of the capital stock of General Aniline & Film Corporation, a Delaware corporation, having its offices in New York and its

[1] See Appendix, *infra*.

factories in New York and New Jersey. All right, title and interest in the property reposed in the respondent corporation.

Respondent alleged in its complaint that it was not and is not an enemy or ally of enemy within the purview of the Trading With the Enemy Act. This, of course, is its primary contention in the litigation. On the other hand, the Government contends that the corporation is enemy or enemy-tainted by reason of the conduct of its management; it is not claimed that this respondent is tainted by reason of entire or even majority stock ownership by enemies. (R. 28).

Petitioners, claiming to be "non-enemy" or "non-enemy-tainted" stockholders of the respondent-corporation, holding eighty-six shares, and further claiming to represent a class of such stockholders,[2] assert that by virtue of certain hypothetical language of this Court in the *Uebersee*[3] case, they can recover a portion of the vested property of this respondent equal to the stock interest of the so-called "non-

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[2] In footnote 6 on page 3 of petitioners' brief it is stated that "non-enemy" shareholders owning over 11,000 common shares out of a total of approximately 140,000 outstanding have filed an affidavit (R. 69) supporting petitioners in their attempted intervention. For sake of accuracy, the outstanding fully-paid common shares approximate 206,000 of which General Aniline & Film Corporation held about 56,000 on the date of vesting—February 16, 1942. In the above-referred to affidavit, the affiant stated (R. 71) that the so-called "protective committee" (affiant's company) intended "formally to become party to said intervention or to intervene independently in such manner as is deemed appropriate, at the earliest opportunity." Despite this statement, neither the company calling itself a "protective committee," nor any subscriber thereto has attempted to intervene. Is it because the various owners of the alleged 11,000 shares acquired them after February 16, 1942? Their identities have not been disclosed, except that the "protective committee" company says it owns 25 shares (R. 70). This company cannot establish ownership as of February 16, 1942.

[3] *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 489, "* * * what part of a friendly alien corporation's property may be retained when only a fractional enemy ownership appears, are left undecided."

enemy" stockholders, even if the respondent-corporation should be denied recovery of *all* such property upon the ground that it is "enemy" or "enemy-tainted."

Petitioners seek to intervene in respondent-corporation's suit, their theories of intervention being as follows:

(1) That under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and under the case of *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, they may intervene "derivatively" to have the corporation assert their alleged proportional claim;

(2) That under Rule 24(a)(3) they may intervene directly—that is, as individuals—to assert such claim, upon the ground that they have an interest in the vested corporate property; and

(3) That there is a "class" of "non-enemy" stockholders, and petitioners represent them in the attempted intervention.

The Court of Appeals' opinion held that petitioners did not come within either clause of Rule 24(a), and affirmed the District Court's denial of intervention. (R. 79-81). It is reported in 188 F. 2d 1017. District Judge Tamm's opinion is not reported. It may be found in the Record at pages 74-76.

Petitioners do not wish to intervene to support the effort of the respondent corporation to recover *all* its property; nor do they find any fault with the conduct of the litigation in this objective. They wish to sponsor in the name of the corporation a secondary position, namely, that if the corporation cannot recover all, then at least it can recover a portion of the vested property commensurate with the interest of the so-called "non-enemy" stockholders in the respondent corporation, e.g. if the "non-enemy" stockholders equal 75% of the respondent corporation, then the Government may retain only 25% of the vested corporate property. However, petitioners qualify this secondary po-

sition by stating that the recovery would be for the direct benefit of the "non-enemy" stockholders and not for the corporation as a whole. It is this qualification and the effects thereof, this respondent submits, which destroy the derivative character of the present proceeding and which demonstrate the individual nature of petitioners' objective. This being so, the instant effort at intervention must fail and petitioners must be left to their independent proceeding which they have filed in New York[4] and which will afford them the opportunity to obtain individual relief, if any exists.

SUMMARY OF CONTENTIONS OF PETITIONERS AND THIS RESPONDENT.

Petitioners strive to convince the Court that, by their intervention, they will proceed derivatively;—that the right to partial recovery is in the corporation. Thus, they seek intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure.

They also invoke Rule 24(a)(3) of the Federal Rules of Civil Procedure, but one cannot believe that petitioners are really serious in this respect, since this rule cannot be invoked for derivative action, and petitioners cannot hope to get into the corporation's suit in an "individual" capacity to assert some right, title or interest in the vested property antagonistic to the corporate claim, or in the event

[4] On March 9, 1950, five days before the original motion was filed in the trial court for leave to intervene, these same petitioners instituted in their own individual behalf, in the United States District Court for the Southern District of New York, a civil action under Section 9(a) against the Attorney General as successor to the Alien Property Custodian, seeking a decree adjudging that they are entitled to the ownership, possession and enjoyment of their proportionate share of the property and funds of this respondent seized by the Alien Property Custodian. (R. 83-86) The defendant therein moved to dismiss such action upon the ground that it failed to state a claim upon which relief could be granted. Judge Samuel Kaufman denied this motion, and the case has been calendared for trial upon the Custodian's answer.

that the corporate claim is not permitted to prevail. Surely, a stockholder, as such, can have no claim upon property in which his corporation has no right, title or interest.

One thing seems absolutely certain, namely, if neither of the above-mentioned rules affords petitioners an avenue of entrance into this case, no amount of argument *generally* can gain admittance for them. They refer disdainfully to procedural hurdles (Pet. br. 37) and technical objections (Pet. br. 43) to their attempted intervention. But their appeal is being addressed to the Court which made the Rules and which thereby, in effect, informed courts, lawyers and litigants that one may intervene in a pending case according to certain prescribed methods, or not at all.

Petitioners rest their case upon three propositions, all of which, this respondent submits, are erroneous, namely: (1) A derivative action may be maintained against a third party for the direct and personal benefit of *some* of the corporation's stockholders; (2) a corporation may be "enemy" or "enemy-tainted" to a certain extent, and at the same time "non-enemy" or "non-enemy-tainted" to a certain extent, within the purview of Section 9(a) of the Act; and (3) so-called "non-enemy" stockholders may recover their aliquot share in vested corporate assets in the statutory proceeding against the United States after it has been determined that the corporation, as owner, cannot succeed in recovering back *all* of the vested property.

To give color to their contentions, petitioners have adopted the approach of charging that the management of respondent corporation has not acted in good faith and is motivated by personal and financial self-interest in their opposition to the present effort of intervention; and, also, that the management has violated its fiduciary duty in seeking, as it is, recovery for the benefit of all, instead of, as petitioners urge, recovery for the benefit of some.

This respondent contends that its loyalty is to the *whole* corporation—to all of its stockholders, including the peti-

tioners, and not merely to some.[5] And this loyalty it is scrupulously adhering to and respecting. Indeed, there is no duty known to the law to urge the individual and conflicting claims of one group as against another. Moreover, from a purely legalistic standpoint, it is this respondent's belief that it would commit "legal" suicide if it adopted petitioners' contention that the corporation can be partly "good" and partly "bad" under Section 9(a). Respondent does not shrink from such a position merely because of inconsistent causes of action. It fully realizes that such are permitted under rules of practice. Instead, respondent feels that such a move would require the statement of an alleged statutory cause of action which would conflict with the statute itself. The entire theory of petitioners' cause of action is that the corporation is "enemy-tainted." If this were not so, the intervention would be unnecessary even from petitioners' point of view; and if it be so, then the corporation has no standing under Section 9(a).

This respondent maintains that petitioners have no right to intervene under either F. R. C. P. 24(a)(2) or 24(a)(3); that they are not asserting a corporate right, but one which is individual in character; and that there is no definable class of "non-enemy" stockholders which petitioners or the corporation could represent.

ARGUMENT.

The fiduciary duty of the corporate management is to all of its stockholders. That duty is being discharged in the main action in which recovery is sought of all the vested property. The interest of the petitioners, like that of all other stockholders, is fully and adequately represented in the main action.

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[5] Petitioners' reasoning becomes quite confused on page 7 of their brief, where they state: "Notwithstanding its fiduciary obligation to the corporation *as a whole* and to its non-enemy stockholders * * *." (Italics supplied) Under petitioners' own theory, these interests are not reconcilable.

The sponsoring of separate and individual claims for the petitioners by the corporation is not based on any fiduciary duty known to the law. To assert such a claim would not only violate the management's duty to all shareholders but would also undermine the basis of the corporation's claim that it is not an enemy. The duty to all shareholders is violated because to assert petitioners' claim is to pit one group of shareholders against another when the fiduciary duty is to represent all. The corporation's claim is undermined because the separate and conflicting claim of the petitioners is necessarily premised upon an allegation that the corporation is enemy or enemy-tainted and is therefore not entitled to recover under Section 9(a).

Rule 24(a)(2) Does Not Afford a Basis for Intervention.

Intervention under F. R. C. P. 24(a)(2)[6] turns upon whether the present attempt is truly derivative. This respondent readily concedes that this is the provision by which stockholders ordinarily intervene in a pending action (in which their corporation is either plaintiff or defendant) for the purpose of asserting a *corporate* claim or defense not already asserted by the management.

In such cases, naturally, intervention is the only opportunity afforded the shareholder to litigate the point which he seeks to maintain. If he permits the chance to pass, he is thereafter estopped. Hence, the applicability in proper circumstances of the latter portion of Rule 24(a)(2)—"and the applicant is or may be bound by a judgment in the action."

But, if the right which is being asserted is not corporate in character, and, instead, is individual, then petitioners

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[6] This provision reads as follows:

"(a) Upon timely application anyone shall be permitted to intervene in an action: * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *."

—if they have such right—would not be bound by a judgment against the corporation. This is both elementary and axiomatic.

This Court has said that "a derivative action is a suit by a shareholder to enforce a corporate cause of action." "And the relief that is granted is a judgment against a third person in favor of the corporation." *Price* v. *Gurney*, 324 U. S. 100, 89 L. Ed. 776. See, also, *Davenport* v. *Dows*, 18 Wall. 626, 21 L. Ed. 938, and *Meyer* v. *Fleming*, 327 U. S. 161, 90 L. Ed. 595.

But petitioners do not seek relief for the corporation. They seek it for themselves personally and individually. They want to recover the aliquot share of the so-called "non-enemy" stockholders, not for the corporation, but for the direct benefit and use of such stockholders.

They invoke a line of cases[7] to support the proposition that a derivative action may be for the benefit of *some* of a corporation's stockholders. In these cases the corporation was not disqualified from recovery; it was merely a matter of expediency and convenience that recovery was permitted directly in favor of plaintiff-stockholders.

This distinction is decisive for our purposes. We reiterate the key-note of our position in this brief. Petitioners seek to assert the cause of action which they sponsor only after—and because—the "enemy taint" of the corporation —disqualification under Section 9(a)—shall have been established.

To support our position that there can be no doubt that petitioners are interested only in the "non-enemy" stockholders—not in the corporation, and that they seek return of a portion of the vested property for *their* benefit, and *only* for *their* benefit, attention is directed to the third para-

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[7] (Pet. br. 42) *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645; *Backus* v. *Finkelstein*, 23 F. 2d 357 (D. Minn. 1927), app. dismissed 31 F. 2d 1011 (C. C. A. 8, 1929), and *Brown* v. *De Young*, 167 Ill. 549, 47 N. E. 863. See the contrary rule in *Keenan* v. *Eshleman* (Del.), 2 A (2d) 904, 120 A. L. R. 227, and the Note following this case in 120 A. L. R. 236

graph of the prayers for relief at the end of the amended complaint in intervention (R. 67), and pages 42-43 of petitioners' brief. While there seems to be some effort to "play down" the language in this respect in their brief in this Court, as compared with their earlier statements in the case,[8] the fact remains, and we have no doubt that petitioners would frankly admit it, that their intervention is to benefit only the "non-enemy" stockholders and not the corporation. The several methods proposed by petitioners for handling the matter all end up with the same result of favoring this so-called class of stockholders and not the corporation.

This Court recently had occasion to deal with an effort to intervene under the same rule in *Sutphen Estates* v. *United States*, U. S. , 96 L. Ed. Adv. Op. #1, page 4. Similarly to this respondent's contention here, this Court said: "The decree in this case * * * therefore is not res judicata of the rights sought to be protected through intervention."

In the case at bar, the asserted rights being in reality "individual" and not corporate, a decision against the corporation cannot foreclose them. Petitioners' claim cannot be considered to be presently embraced within the instant complaint in the statutory action, since it would run counter to the statute. The court below stated: "If they have a right to a share of the vested property, they cannot be deprived of it in a suit to which they are not parties."

The case of *Standard Oil Co.* v. *Clark*, 167 F. 2d 917 (C. C. A. 2, 1947), Cert. denied 333 U. S. 873, is strongly relied upon by petitioners. It is invoked for two purposes, one being to support the idea of segregating "enemy" and "non-enemy" owners of vested property, and the other being to give color to their contention that a corporation

[8] In petitioners' brief in the Court of Appeals, they stated as a part of the "Question Presented" that they were entitled to intervene "To assert that the corporation is entitled to the return of the non-enemy proportionate interest in the vested property, for the benefit of its non-enemy shareholders."

may be enemy *to the extent* of its enemy stockholders and non-enemy *to the extent* of its non-enemy stockholders.

The separation which was made in the *Standard Oil* case is far different from the problem which petitioners try to present to this Court in the case at bar. In that case, intermixtures of enemy and non-enemy ownership were capable of separation on the basis of direct ownership by Americans and Germans, respectively, while here, petitioners seek to have the Court separate, and release to them as their own property, vested corporate assets in which they have neither a direct nor recognizable separable interest.

Reliance by petitioners upon the phrase "to the extent," which is found in Executive Order 8389, and which was dealt with by the Circuit Court of Appeals in the *Standard Oil* case in quite an indirect fashion, reflects the extreme reasoning which petitioners must employ in an effort to support their present contentions. The manner in which Circuit Judge Clark referred to the "Executive definition of foreign national" easily demonstrates that he was not using the phrase "to the extent" as a modification or expansion of the definition of "enemy" under Section 9(a).[9]

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[9] With even less merit, petitioners have included a chapter in their brief (pp. 26-36) entitled "Executive and Legislative Developments." Instead of aiding petitioners, this chapter establishes the opposite of anything which would support their theories. They refer to the "IARA" Agreement (The Agreement Relating to the Resolution of Conflicting Claims to German External Assets, 18 State Dept. Bull. pp. 6 *et seq.*), to House Joint Resolution 516, to statements of officials of the Office of Alien Property, to the President's veto of a private bill (H. R. 8422, 81st Cong. 2nd Sess.), and to legislation that was pending in the 81st Congress and is pending in the instant (82nd) Congress. None of these references aids petitioners in their present effort to have this Court construe the Trading With the Enemy Act, *as it now stands*, in a manner favorable to their position.

The "IARA" Agreement is obviously not designed to modify the Trading With the Enemy Act by bestowing any justiciable rights; that is to say, its objectives are to be achieved administratively on the international level, and are not intended to modify existing municipal law. (See Article 33 of the Annex to the Agreement) Also—and this is directly controlling—petitioners

Rule 24(a)(3) Has No Application Here.

Should petitioners fail to intervene derivatively under Rule 24(a)(2) because their claim is *not* a corporate one, they then invoke Clause (3) of the same rule[10] upon the theory that they would be personally adversely affected by a disposition of the vested property as the result of a decision against the corporation.

As the Court of Appeals pointed out in its decision below, this clause of the Rule contemplates that the person having the right of intervention should have a legal interest in the property.[11] The Court then proceeded to demonstrate, by citation of decisions of this Court, that a stockholder has

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were obliged to admit on page 34 of their brief that in the execution of the "IARA" Agreement, the United States delegation expressly reserved that its provisions should not apply to the subject matter of the instant case.

Petitioners' theme seems to be that the legislative efforts have not been for the purpose of conferring new rights, but, instead, they are designed to simplify procedures in relation to existing ones. Reference to the President's veto of H. R. 8422 (Pet. br. 30-31) is an immediate and powerful contradiction of this contention. The President, in his veto message, expressly recognized that there is no remedy under present statutes for the situation which confronts petitioners. He speaks of exactly the problem which exists here.

The bills which were pending in the 81st Congress, and whose counterparts are pending in the 82nd Congress, all demonstrate that it is not merely a matter of clarifying the present state of the law, but that it is considered that there is presently a total absence of statutory support for petitioners' contentions.

[10] This provision of the rule is as follows:

> "(a) Upon timely application anyone shall be permitted to intervene in an action * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

[11] *Pure Oil Co.* v. *Ross*, 170 F. (2d) 654 (CCA 7, 1948); *Dowdy* v. *Hawfield*, —— U. S. App. D. C., 189 F. 2d 637; *United States* v. *Columbia Gas & Electric*, 27 F. Supp. 116 (D. C.) D. Dela., 1939); *Cf. Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4, 1933); *Cross* v. *Missouri & A. Ry.*, 74 F. Supp. 242 (D. C., W. D. Ark., 1947); *In re Bender Body Co.*, 6 F. R. S. 379 (D. C., N. D. Ohio, 1942).

no such interest in the corporate property.[12] We agree with all that has been said by the lower court and urge these propositions upon the Court at this time, but there is another reason, even more peculiarly applicable to the case at bar, which makes it impossible for petitioners to intervene under Clause (3).

If the corporation is "enemy-tainted," its present action fails, and the corporation loses all right, title and interest in the vested property. If the corporation no longer has an interest in the property, then surely its stockholders would not have even an expectancy in liquidation. It is just the same as where corporate property is lost through mortgage foreclosure or judgment execution. There is no property against which the claim of interest can be asserted, even if one assumes the claim to be a valid one.

Clause (3) of the Rule also requires that the one seeking intervention shall be "adversely affected" by the outcome of the main proceeding. See *Sutphen Estates* v. *United States*, *supra*. Petitioners cannot be so affected in view of the pendency of their New York action in which their individual interests are being asserted. And it will be remembered that that action draws to it sufficient of the vested property to satisfy petitioners' claim there.[13]

In view of all of the foregoing, it seems clear, as this Court stated in the *Sutphen* case, that petitioners have "not maintained the burden of showing that under Rule 24(a)(3) it [they] may intervene as of right."[14]

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[12] *Donnell* v. *Herring-Hall Marvin Safe Co.*, 208 U. S. 267, 277; and *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24. See also, *Eisner* v. *Macomber*, 252 U. S. 189, 208; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81; *First National Bank* v. *Maine*, 284 U. S. 312, 329-330; and Moore's Federal Practice (Second Edition) Paragraph 24-09 (pp. 45-46 of Vol. 4).

[13] Section 9(a) of the Act provides that if suit be instituted, such property as is sought to be recovered shall be retained by the Government officials until final disposition of the case by the court.

[14] There is no other basis for intervention available to petitioners. It is not clear whether petitioners continue erroneously to rely upon *Missouri-Kansas Pipe Line Co.* v. *United States*, 312

The Idea that There is a "Class" of "Non-Enemy" Stockholders is a Fiction Created by Petitioners for the Purpost of Their Present Attempt to Intervene. There Is No Such Class.

The matter of a "class" of "non-enemy" stockholders arises in two ways upon the instant effort at intervention. One has to do with the representative character of petitioners' move, and the other with the group of beneficiaries under petitioners' theory of derivative corporate action.

As to the former, petitioners' attempted representation of a "class" of "non-enemy" stockholders must arise in connection with the assertion of "individual rights"—thus under Rule 23(a) and the third clause of Rule 24(a); and not in relation to the derivative action which they claim the corporation can maintain. Because of this, not only must the usual prerequisites of a class action be present, but the objections to intervention as individuals—elsewhere herein discussed[15]—equally apply to the intervention of the so-called class.

The other phase of the "non-enemy class," arising from petitioners' theory that the corporation has a cause of action for such a group of its stockholders, and that, in effect, there is a composite mass or unit of them, while not tested

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U. S. 502, as an independent ground for intervention. They did this in the two lower courts, urging that this Court recognized a right of intervention not arising from Rule 24. That the case has a very narrow scope, bottomed entirely upon the consent decree involved therein, is clearly stated by the Court in *Allen Calculators* v. *National Cash Register Co.*, 322 U. S. 137, 141, 89 L. Ed. 1188, 1191, where the Court said:

> "The appellant relies upon *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 85 L. Ed. 975, 61 S. Ct. 666. That case, however, is to be distinguished. There the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken. Such action was taken and, despite the terms of the original decree, intervention was denied. * * *"

[15] Lack of legal interest in the property; and absence of corporate property after defeat of the corporation.

by the prerequisites of a class action, corroborates very convincingly our argument that there is no corporate right or objective involved, but instead that there may be many individual claims, but less, however, than the totality of the stockholders.

Aside from the arguments made elsewhere as to why, on the one hand, intervention as an individual is impossible, and, on the other hand, the action is not truly derivative, the chaos which would follow if either of petitioners' theories were permitted to prevail in the proceeding is, this respondent submits, more than adequate to destroy such theories. This will be discussed in the following, sometimes in relation to the representative action, sometimes as to the alleged corporate right, and sometimes generally.

In the lower courts, and in opposition to the petition for certiorari in this Court, this respondent pointed out that there is no unified class of "non-enemy" stockholders, such as exists when one refers to "common" or "preferred" stockholders. In other words, the mere ownership of common or preferred shares in a corporation is the complete key to the latter classification, while in the case of so-called "enemy" and "non-enemy" stockholders, the personal and individual status of the stockholder himself is the test.

This respondent argued from the foregoing that not only could there be no class action because of this situation, but that the present issue of whether the corporation is "enemy" or "non-enemy" would be transformed into multitudinous issues as to whether each stockholder was "enemy" or "non-enemy". Also, that the allowance of intervention in favor of "non-enemy" stockholders, or even to sponsor a corporate claim in their behalf, would create an inherent antagonism. There would be no reason why the so-called "non-enemy" stockholders would support the corporate claim for the return of all the vested property; in fact, it can easily be visualized that if the "non-enemy" stockholders should be given a place in the corporation's lawsuit, such stockholders, in anticipation of personal re-

covery to the full extent of their aliquot share in the respondent corporation, would abandon the side of the corporation and be interested only in the speedy establishment of their own eligible status. Viewing the situation as one in which the corporation is also sponsoring the right of the "non-enemy" stockholders, the litigation would fast disintegrate into a "free-for-all" in which the corporation would find itself not only in conflict with the so-called group of "non-enemy" stockholders, but on that account, as well, in conflict with itself.

In view of these contentions on this respondent's part, petitioners urge, on page 43 of their brief, that under the *Uebersee* case, the respondent corporation "might be placed under the burden of proving the enemy or non-enemy character of its shareholders" and that, therefore, the burden after intervention would be no greater than before. In this respect petitioners misconceive the issues raised between the corporate respondent and the United States in the main proceeding. An examination of the first separate defense (R. 28-30) discloses that the Government does not contend that the respondent corporation is entirely owned by "enemy" stockholders, or that the status of every stockholder has been put in question. It is only the stockholdings of the so-called Sturzenegger-Baslé group (the management) whose ownership or control by I. G. Farben is charged. There are approximately three thousand stockholders in the respondent corporation. In the *Standard Oil* case, where, as here, the management of the corporation was charged with having dealings with I. G. Farben, surely no one ever dreamed of the absurd idea that the burden was placed upon the Standard Oil Company of New Jersey to establish the non-enemy status of the thousands of its stockholders.

It is suggested on page 41 of petitioners' brief that "for proper judicial administration" the principal action should be both the locale and the medium for the disposition of the claim which petitioners espouse. Of course, this is the rea-

son ordinarily for a class action, but here again petitioners cannot ignore or overlook the prerequisites of such an action. In addition to the fact, as petitioners admit on page 44 of their brief, that the *other* shareholders did not file claims as required by Section 9(a) as a condition precedent to the institution of suit, nor did they file suit within the limitations period prescribed by Section 33 of the Act, there is no class, in the sense of persons similarly situated, within the purview of Rule 23 of the Federal Rules of Civil Procedure. See *Moore's Federal Practice* (Second Edition), § 23.04; and compare the facts in *Mitchell* v. *Wright*, 62 F. Supp. 580 (D. C., N. D. Ala. 1945), reversed on other grounds, 154 F. 2d 924, cert. denied 329 U. S. 733.

This case is not like one where a number of gasoline retailers joined in a class action against the large oil companies to recover treble damages for conspiracy under the anti-trust laws (*Weeks* v. *Bareco Oil Co.* (C. C. A. 7th, 1941) 125 F. 2d 84); nor where a railroad negligently sets fire to property and widespread damage to many property owners ensues (*Moore's Federal Practice* (*Second Edition*), § 23.10 (page 3443). In such cases, the gravamen of the action—common to all—is the conduct of the defendant—conspiracy or negligence, and the variations in damages of the several plaintiffs are merely incidental; while in the case at bar, there is no similar common situation, but instead the separate status of each of the plaintiffs is the important and determinative element.

And, from the viewpoint of petitioners' theory that the right is a corporate one, the corporation would be obliged to litigate successively the personal status of each of the so-called "non-enemy" stockholders. In this connection, the burden would rest upon the corporation to establish this proof. How would it be procured? This respondent's shareholders are not only in Switzerland and the United States, but in many of the other nations of the world. If the responsibility is that of the corporation, how will it go about establishing the so-called "non-enemy" status of

every member of the alleged "class"? Surely, it could neglect none. And lack of cooperation of the shareholder or his unavailability should not excuse the corporation from the duty which petitioners would impose upon it, for it must be remembered that petitioners call it a "corporate" claim.

Take, for example, the status of the petitioners in this case, Mr. and Mrs. Kaufman. They point out in footnote 9 on page 6 of their brief that they were German in 1940; they imply that they were stateless when war broke out between the United States and Germany; and they say they are now American citizens,—doubtless so after February 16, 1942, the date of vesting. Petitioners say, on page 6 of their brief, "that it is unquestioned that the petitioners and other non-enemy shareholders similarly situated have no connection with the management group." It may be said that this is "unquestioned" only because the occasion for the Government to raise the question has not occurred. This respondent does not impute an "enemy" status to the petitioners, any more than it does to itself, but if it be enemy—which is vigorously denied—natural questions occur, such as: Did the Kaufmans send proxies from year to year to the management of the corporation? Did they know of and ratify courses of conduct which are now complained of by the Government as indicative of enemy taint on the part of the corporation? Did they purchase their stock when they resided in Germany because of the historical relationship formerly existing between this respondent and I. G. Farben? These and many other questions may be asked of members of the so-called "non-enemy" class of stockholders. Also, it is quite possible that an individual stockholder might be tainted by reason of some personal relationship with Germany or Japan. No one can defend against this but the individual himself. When one refers to such things, the idea that a corporate right is the medium for their litigation becomes quite untenable.

And so the result is that instead of the main corporate proceeding providing the "proper judicial administration"

for petitioners' claims, whether they be *called* individual, representative or corporate, the allowance of intervention would inevitably transform an already complex lawsuit into a confusion and an impossibility which would only tend to bring the orderly administration of justice into disrepute.

We do not make these arguments as if the intervention which is sought were discretionary, but because they help to demonstrate that the bases for intervention as a matter of right are being distorted or misapplied by petitioners in their present effort.

Petitioners Cannot Intervene to Prevent a Settlement Between Respondents.

Despite their effort to make a distinction,[16] the reasons hereinbefore discussed which defeat petitioners' right to intervene either for the corporation or individually, equally defeat their effort to prevent a settlement between the parties. Actually, the latter is a corollary of the former.

There is not here presented the typical situation where a shareholder intervenes derivatively to block a settlement which is the result of fraud and collusion between his corporation and other parties to the litigation. See *Pyle-National Co.* v. *Amos,* (7th Cir.) 172 F. 2d 428. In that case the intervention was for the purpose of preventing a compromise that would hurt the corporation, and not, as here, one that it is claimed would hurt a group of stockholders.

Petitioners make no contention that the corporation, as such, would suffer from the proposed compromise. They go even further and admit (Pet. br. 46-47) that "the non-enemy shareholders might not have the standing to object if it were not to be at their expense." How could they more forcefully emphasize the personal and individual in-

[16] Pet. br. 46: "However, in considering whether intervention is essential to prevent an improper and illegal settlement, it is unnecessary to determine whether the corporation or the individual shareholder is the proper claimant."

terest of the stockholders as distinguished from the protection of the corporation as a whole?

And petitioners explain what they mean by repeating their main position, namely, that the "non-enemy" stockholders are entitled to receive their aliquot share in full, undiminished by (1) a compromise which would necessarily be less ratably, and by (2) the inclusion of so-called "enemy" stockholders of the respondent-corporation.[17]

Here, again, the test is whether petitioners may intervene under clause 2 or clause 3 of Rule 24(a),—whether the move is derivative or whether it is individual. There is no other basis available to petitioners. It cannot be the former because the objective is not corporate benefit, as petitioners so clearly have demonstrated by the manner in which they state the proposition; and while this respondent submits that it is not individual for the reasons hereinbefore stated, if it should be so, then the New York proceeding is ample protection for petitioners. As we pointed out on page 12 *ante*, so much of the vested property as equals petitioners' proportionate interest in the respondent-corporation must be held intact to await the outcome of that action.

But petitioners will reply that members of their "class" have not filed separate 9(a) proceedings, and therefore are not as protected as they are. The answers are twofold: (1) There can be no class action here, as we have hereinbefore shown; and (2) we submit that there is no individual interest in the corporate property, but if there should be, the members of the "class" had recourse similar to that

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[17] Regarding petitioners' emphasis upon the 11% ownership of stock of this respondent by Germans (Pet. br. p. 6), the Court is reminded that under the Swiss-Allied Agreement of 1946, sometimes called the "Washington Accord" (14 State Dept. Bull. 1101-2, 1121-24)—referred to by petitioners in footnote 16 on page 35 of their brief—such German shares are subject to liquidation through the Swiss Compensation Office in such way that the Allies (United States, United Kingdom, France, etc.), will receive fifty percent of their value, and the Government of Switzerland the other half. Consequently, it is not possible for such shareholders to receive the benefit of such compromise.

pursued by petitioners, and if the statute of limitations (Section 33) bars them, they cannot complain about the absence of individual recourse.[18]

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[18] The respondent-corporation is accused by petitioners of misleading the "non-enemy" stockholders (Pet. br. p. 44), and of indulging in a course of conduct "designed to prevent the non-enemy stockholders from protecting themselves heretofore in any other fashion." (Pet. br. p. 45). There is not a word in the record of this case to justify or support these statements, and they are not true in fact. The *Uebersee* case was decided by this Court in December, 1947, and the corporation's action was filed in October, 1948. Petitioners began filing their claims on March 28, 1942, according to allegations in their New York complaint, and continued to do so until June 15, 1948 (R. 84-85). They filed their original motion for leave to intervene on March 14, 1950. At no time has this respondent indicated that it believed in petitioners' theory of a corporate action to protect its so-called "non-enemy" stockholders, or that it intended to protect one group of its stockholders instead of affording protection to the corporation as a whole.

Is it not strange that the two petitioners who hurl these accusations at their corporation were not themselves "mislead" nor prevented "from protecting themselves" by a very early assertion of their claim and the timely filing of a 9(a) action? This attack upon the corporation will not withstand the simplest analysis. If the right is in the individuals, surely the corporation had no duty to awaken the stockholders; and if it is in the corporation, petitioners are not only sponsoring it but they feel sure that "no issue as to limitations arises in this case." (Pet. br. p. 44). So, of what do petitioners complain? They fear their derivative move will not survive by reason of its own strength, and hence they invoke an estoppel to prevent both the Government and this respondent from denying "that the corporation is the proper claimant." (Pet. br. p. 45). We have already pointed out that petitioners cannot sustain their charge against the corporation. They do not even suggest a reason why the Government is estopped.

CONCLUSION.

Having established in the foregoing that petitioners cannot intervene either derivatively or individually and for an alleged class in this respondent's statutory action under Section 9(a) of the Trading With the Enemy Act, the judgment of the court below is correct, and it should be affirmed.

Respectfully submitted,

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December 26, 1951

APPENDIX.

Trading With the Enemy Act, as Amended.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then

such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.